Supreme Court, U.S.
FILED

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

CASSAN ENTERPRISES, INC., ET AL.,
*Petitioners,*

v.

DOLLAR SYSTEMS, INC., ET AL.,
*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The State of Washington has declared the Franchise Investment Protection Act to be "a fundamental policy of the State of Washington" and expressly made it applicable "to existing and future franchises and contracts." The court of appeals held that it was unconstitutional under the Contract Clause of the U.S. Constitution to apply this Act to franchise contracts existing at the time of enactment.

The questions presented are:

1. Are provisions of the Act that prohibit franchisors from discriminating among franchisees in business dealings without a reasonable basis a substantial and unjustified impairment of contract under the Contract Clause?

2. Is the protection of franchisees from the abuses that arise from the superior bargaining position of franchisors a significant and legitimate public purpose?

3. In determining whether state legislation violates the Contract Clause, what deference should be accorded the state legislature's judgment that its legislation is reasonable and appropriate to achieve a significant and legitimate public purpose?

## PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The petitioners in this case are Cassan Enterprises, Inc. and C.M.C. Investments, Inc., which is a wholly owned subsidiary of Cassan Enterprises, Inc. Neither of these corporations has parents or subsidiaries other than as mentioned above. Todd Investments, Inc. was a plaintiff below. It is not a part of the Seattle franchise at issue in this petition and therefore is not a petitioner before this Court.

The respondents are Dollar Systems, Inc., Dollar Rent-A-Car Systems, Inc. and Pentastar Transportation Group, Inc. Upon information and belief, Dollar Systems, Inc. and Dollar Rent-A-Car Systems, Inc. have merged and are currently known as Dollar Rent A Car Systems, Inc. Dollar Rent A Car Systems, Inc. is a wholly-owned subsidiary of Pentastar Transportation Group, Inc., which is a wholly-owned subsidiary of Chrysler Corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Cassan Enterprises, Inc. and CMC Investments, Inc. respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered November 28, 1997.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 129 F.3d 124 (9th Cir. 1997). The opinion of the Ninth Circuit is unpublished (App. A-1). The memorandum opinion of the United States District Court for the Western District of Washington granting respondents' motions for summary judgment on claims arising under the Washington

Franchise Investment Protection Act is also unpublished (App. A-11).

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 28, 1997. The petition for rehearing was denied on January 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. I, §10 provides in pertinent part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

The pertinent provisions of the Washington Franchise Investment Protection Act and the Washington Consumer Protection Act are set out in the Appendix (A-21).

## STATEMENT OF THE CASE

Petitioner Cassan Enterprises, Inc. ("Cassan") is the "Dollar Rent A Car" franchisee in Seattle, Washington. It entered into a franchise agreement with Respondent Dollar Rent-A-Car Systems, Inc. ("Dollar") in 1967. Cassan sub-franchised its operating rights at the Seattle-Tacoma airport and the surrounding area to its wholly owned subsidiary CMC Investments, Inc. ("CMC"). Cassan leased cars to CMC and CMC rented the cars to rental car customers.

In July 1993, petitioners filed suit against respondents alleging discriminatory treatment of the Cassan "Dollar Rent A Car" franchise in violation of the Washington Franchise Investment Protection Act ("FIPA" or "Act"). The discriminatory acts included restrictions on the vehicles that Cassan could advertise

in conjunction with the Dollar trade name, service marks and logos, and Dollar's failure to support Cassan's bid for a full service rental car position at the Seattle-Tacoma airport.

### A. Restrictions on Advertising

For 25 years Cassan used the Dollar trade name, service marks and logos in advertisements featuring various automobile makes, including GM, Chrysler and Ford. In August 1990, Dollar was purchased by Respondent Pentastar Transportation Group, Inc. ("Pentastar"), which is a subsidiary of Chrysler Corporation. After the acquisition, Dollar directed Cassan not to use the Dollar service marks or logos in advertisements with any automobile manufactured by a competitor of Chrysler. Petitioners allege that this restriction on the use of Dollar service marks and logos was made for the benefit of Chrysler and not for any legitimate business purpose of the Dollar franchise system.

The Complaint specifically alleged that Cassan had entered into an agreement to purchase 2700 GM cars. Under the terms of the agreement, Cassan would receive a $150 per car reimbursement toward advertising that included references to GM automobiles. The respondents threatened to sue GM and directed petitioners that they could not engage in such advertising. The Complaint alleged that respondents took these actions even though they permitted at least two other Dollar franchises to advertise GM cars in connection with the Dollar logos and service marks during the same time period.

### B. Failure to Support the Seattle-Tacoma Airport Bid

Cassan and CMC held a license from the Port of Seattle to operate a full service rental car business at the Seattle-Tacoma airport. A full service rental car operator has counter space in the terminal and car servicing and ready-car storage in the airport

garage. Rental car operators periodically must bid for the right to retain their concession agreements. If the bid is successful, the operator is obligated to pay 10 percent of its gross income to the Port or the amount of its bid, whichever is greater.

Dollar had historically granted reductions in its franchise fees or provided other forms of financial support to permit its franchisees to retain positions in airports. The Complaint alleged that respondents refused to negotiate any reduction in the franchise fee or other financial support with Cassan. As a consequence, Cassan's bid was not sufficient to retain its concession agreement as a full service rental car operator at the Seattle-Tacoma airport.

### C. The Washington Franchise Investment Protection Act

The FIPA became effective in 1972, five years after Cassan's original franchise agreement with Dollar. The Act specifies that its provisions are applicable to "all franchises and contracts existing between franchisors and franchisees and to all future franchises and contracts." RCW 19.100.900. The Act makes it "an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

> (c) Discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is: (i) Reasonable, (ii) based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time, or is based on other proper and justifiable distinctions considering the purposes of this chapter, and (iii) is not arbitrary. . . .

RCW 19.100.180. The FIPA provides that "any unfair or deceptive acts or practices or unfair methods of competition prohibited by RCW 19.100.180 . . . shall constitute an unfair or deceptive act or practice" under the provisions of the Washington Consumer Protection Act ("CPA"), RCW 19.86 *et seq.* RCW 19.100.190(1). The CPA authorizes suits for damages. RCW 19.86.090.

Petitioners' suit was filed in the Superior Court of Washington for King County. The Complaint alleged that the respondents discriminated between Cassan and other franchises in violation of the FIPA (1) by essentially requiring Cassan to lease Chrysler cars and refusing to allow it to accept the benefits of a GM contract while other franchisees were permitted to do so, and (2) by providing assistance to other franchises to retain their positions as full-service airport rental car companies while denying similar assistance to Cassan. The Complaint sought relief for the FIPA violations under the CPA and also included common law claims of breach of contract, tortious interference, wrongful conversion and unfair competition.

### D. The Litigation Below

Respondents removed this case to the United States District Court for the Western District of Washington on the basis of diversity of citizenship, 28 U.S.C. §1332(a); 28 U.S.C. §1441. They then filed a summary judgment motion arguing that petitioners' FIPA claims were barred by the Contract Clause of the U.S. Constitution, U.S. Const. Art. I, §10, because the franchise agreement between Cassan and Dollar was entered into prior to the enactment of the FIPA.

The district court granted summary judgment on the FIPA claims. It relied on *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F.Supp. 248 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982) (without opinion). The district court did not discuss the

specific provisions of the FIPA or the public purpose motivating the legislation. It merely stated:

> Application of the FIPA to the contract between Dollar and Cassan would substantially impair Dollar's contractual rights because it would alter the reasonable expectations of the parties. The FIPA was addressed at only a narrow class, not a general or broad societal problem; the state has not previously regulated franchises in this manner; the contractual relationship between franchisor and franchisee was changed in a severe and permanent manner by the FIPA; the contract between Cassan and Dollar appears to be the result of bargaining by the parties; and throughout the years since the contract was signed, the parties appear to have relied upon its terms. Accordingly, the FIPA cannot constitutionally be applied to the contract entered into by Cassan and Dollar prior to its enactment.

(App. A-14 to A-15).

Petitioners' remaining claims, including a general claim for relief under the CPA, were submitted to a jury. The jury returned a verdict against Dollar for $8.7 million. That verdict was reversed by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit held that petitioners could not prevail on their CPA claims because petitioners had not shown "an unfair deceptive act or practice." To establish "an unfair deceptive act or practice" under the CPA, RCW 19.86.020, it is necessary to show either "a per se unfair act based on a violation of a statute" or that the respondents' "act or practice has a capacity to deceive a substantial portion of the public." (App. A-4). Because Cassan was barred by the Contract Clause from proving a violation of the FIPA, Cassan could not show "a per se unfair act based on violation of a statute." The Ninth Circuit held

that Dollar's refusal to consent to Cassan's advertising agreement with GM or to reduce its franchise fee or otherwise support Cassan's license bid "did not have the capacity to deceive a substantial portion of the public." (App. A-4, A-8).

The Ninth Circuit affirmed the district court's judgment that the FIPA could not be applied to a franchise contract executed prior to enactment of the FIPA. The Ninth Circuit's discussion is perfunctory.

> Interference with a private agreement implicates the Contract Clause when: (1) there is a contractual relationship; (2) a change impairs the contract; and (3) the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The Clause prohibits such impairments unless legitimate governmental interests justify them. *Northwestern Nat'l Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980).
>
> The [District Court] found FIPA's interference both substantial and insufficiently justified. It relies for these conclusions on *Chico's Pizza Franchise, Inc. v. Sisemore*, 544 F.Supp. 248, 249-50 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982). We agree.

(App. A-10).

## REASONS FOR GRANTING THE WRIT

This case is paradigmatic of a misapplication of the Contract Clause that has frustrated legislative reform of abuses in the franchising industry. While this Court has stressed sensitivity to legislative judgments as essential to modern Contract Clause analysis, a majority of lower courts have invalidated *any* application of franchise reform legislation to pre-existing franchise contracts regardless of the nature of the impairment or the

justification for the legislation. These cases are not only in conflict with the minority of courts that have upheld retroactive application of franchise protection laws, but they also conflict with the manner in which this same majority has applied the Contract Clause in other contexts. This inconsistency in the application of the Contract Clause is the product of widespread confusion in the lower courts about the deference to be accorded state legislative judgments regarding the reasonableness and appropriateness of legislation that affects private contracts.

This case involves a very basic but benign franchise reform principle: that a franchisor should not discriminate among similarly situated franchisees in the enforcement of franchise agreements. It is particularly benign in the context of the franchising industry, which was built on the promise of uniformity and consistency.[1] This case presents this Court with an opportunity to clarify the deference to be accorded state legislative judgments and to restore balance and perspective to the Contract Clause's application in one of the largest and most dynamic parts of the retail industry in the United States.

## I

## The Importance of the Franchise Industry and the Justification for Legislative Reform

Franchising may be the most significant single component of the retail industry. "Over half a million franchises operate in the

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[1]Robert W. Emerson, *Franchise Contract Clauses and the Franchisor's Duty of Care Toward Its Franchisee*, 72 N.C.L.Rev. 905, 940-41 (1994):

> The franchisor argues that uniformity is essential—that what the franchisee seeks is uniformity insofar as it improves the marketing of the trademark, the business concepts, and the overall goodwill that the franchisee purchases. Consistent with this argument, some states statutorily bar a franchisor's discriminatory treatment of one franchisee as compared to others.

United States, and they account for more than a third of the nation's total retail sales."[2] At least twenty-two states regulate franchising in some fashion pursuant to statutes enacted at various times from the early 1970s into the 1990s. Over one-third of the states regulate the post-purchase relationship between the franchisor and franchisee.[3]

This regulation arises out of concerns about the franchisee's unique dependence on the franchisor and the history of abuses in the franchise industry. When the FIPA was under consideration in the Washington House of Representatives, the Office of the Washington Attorney General urged its passage in the most forceful terms:

> I cannot overemphasize the urgent need for this legislation that I expressed at the committee hearing. The alarming trend of increase in the incidence of unscrupulous franchising operations in this state can only be expected to accelerate in this time of unemployment with increasing numbers of persons desperately attempting to "buy a job."

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[2] *Id.* at 908-909 (citing sources).

[3] The District of Columbia the Virgin Islands, and Puerto Rico also have statutes regulating the franchise industry. *See* Ark. Code Ann. §§4-72-201 to -210 (Michie 1987); Cal. Bus. & Prof. Code §§20000-20043 (West 1997); Conn. Gen. Stat. §§42-133e to -133h (1997); Del. Code. Ann. tit. 6 §§2551-2556 (1974); D.C. Code §§29-1201 to -1208 (1981); Haw. Rev. Stat. §482E-1 to -12 (1993); 815 Ill. Comp. Stat. Ann. 705/1 to 705/44 (1993); Ind. Code Ann. §23-2-2.7-1 to -7 (Michie 1995); Iowa Code Ann. §§523H.1 to 523H.17 (West Supp. 1998); Mich. Comp. Laws Ann. §445.1501 to .1546 (1989); Minn. Stat. Ann. Chapter 80C (West 1986); Miss. Code Ann. §§75-24-51 to -61 (1991); Mo. Rev. Stat. §§407.400 to .420 (1975); Neb. Rev. Stat. §§87-401 to -410 (1994); N.J. Stat. Ann. §§56:10-1 to :10-15 (1984); Va. Code Ann. §13.1-557 to -574 (Michie 1993); Wash. Rev. Code §§19.100.010 to .940 (1989); Wis. Stat. §§135.01 to .07 (1985); P.R. Laws Ann. tit. 10, §14-278 to -278d (1994); and V.I. Code Ann. tit. 12A §§2-130 to -139 (1997). *See generally* R. Barkoff & A. Selden eds., *Fundamentals of Franchising*, 136 n.7 & App. B (ABA Forum on Franchising 1997).

(App. A-25). As the Supreme Court of Washington has observed,

> "The franchisor normally occupies an overwhelmingly stronger bargaining position and drafts the franchise agreement so as to maximize his power to control the franchisee. Franchisors have used this power to terminate franchises arbitrarily, to coerce franchisees under threat of termination, and to force franchisees to purchase supplies from the franchisor or approved suppliers at unreasonable prices, to carry excessive inventories, to operate long, unprofitable hours, and to employ other unprofitable practices."

*Coast to Coast Stores, Inc. v. Gruschus*, 100 Wash.2d 147, 150, 667 P.2d 619, 621 (1983) (quoting Donald S. Chisum, *State Regulation of Franchising: The Washington Experience*, 48 Wash.L.Rev. 291, 297-98 (1973)). "The provisions of FIPA reflect a fundamental policy of this state to protect its citizens from oppressive practices historically associated with the sale of franchises." *Rutter v. BX of Tri-Cities, Inc.*, 60 Wash.App. 743, 748, 806 P.2d 1266, 1268 (1991). It is expressly stated in the FIPA that the Act "represents a fundamental policy of the state of Washington." RCW §19.100.220.

## II

## This Court's Contract Clause Jurisprudence

Under this Court's precedents, the constitutionality of applying FIPA's antidiscrimination provisions to existing franchise contracts is established by the public purpose underlying the franchise protection legislation and the legislative judgment that the provisions of the FIPA effectuate that purpose. The Court has long emphasized that the constitutional prohibition against "impairing the Obligation of Contracts" "is not an absolute one and

is not to be read with literal exactness like a mathematical formula." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 428 (1934). In *Blaisdell*, the Court upheld application of the Minnesota Mortgage Moratorium law to pre-existing mortgage contracts. This law permitted postponement of foreclosures and extension of redemption periods in a manner inconsistent with the provisions of the mortgage contracts. Writing for the majority, Chief Justice Hughes observed:

> With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the [contract] clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.

*Id.* at 443-444. Thirty years later this Court reiterated the "' wide discretion on the part of the legislature in determining what is and what is not necessary.'" *El Paso v. Simmons*, 379 U.S. 497, 508-509 (1965) (upholding limitation legislatively imposed after sale on reinstatement rights of purchaser of public land) (quoting *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232-233 (1945)).

In the late 1970s this Court distinguished between contractual obligations involving private parties and those where the State is a party to the contract. The public contract is subject to greater scrutiny because the State's self-interest is implicated. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court held unconstitutional under the Contract Clause the repeal of a covenant that protected bondholders by restricting the ability of the Port Authority of New York and New Jersey to use revenues that had been pledged as security for Port Authority bonds.[4]

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[4]Justice Brennan in his dissent described *United States Trust Co.* as "the first case in some 40 years in which this Court has seen fit to invalidate purely economic and social legislation on the strength of the Contract Clause. . . ." 431 U.S. at 60.

The following Term the Court decided *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). *Spannaus* involved Minnesota's Private Pension Benefits Protection Act and its retroactive application to pension plans. Pursuant to the Act, an employer who closed a Minnesota office was essentially required to provide a full pension to all former Minnesota employees with more than 10 years of service even if the employee had no vested pension rights under the employer's existing plan.

The Court found that the effect of Minnesota's Private Pension Benefits Protection Act on Allied's contractual pension fund obligation was "severe." "[T]he statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts." *Id.* at 247. Furthermore, the Court found that the Minnesota legislation did not serve a public purpose: it was addressed to a narrow group of employers rather than a "broad, generalized economic or social problem." *Id.* at 250. This Court has never had occasion to invalidate a state statute under the Contract Clause in the twenty years since *Spannaus*.

In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), this Court declined to invalidate retroactive application of state price controls to a contract between a natural gas producer and a public utility. Kansas imposed the price controls after federal gas deregulation portended significant intrastate price increases under existing production contracts.

The Court held that the contract was not substantially impaired because the natural gas producer could not reasonably have expected that it would receive the benefit of deregulated prices under the contract. Nevertheless, the Court went on to clarify the test to be applied under the Contract Clause when a contract is impaired. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regula-

tion. . . ." *Id.* at 411. "[T]he public purpose need not be addressed to an emergency or temporary situation." *Id.* at 412. "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Id.* (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

In its opinion, the *Energy Reserves* Court distinguished *Spannaus* as a case involving special interest legislation. "The pension statute [in *Spannaus*] had a very narrow focus: it was aimed at specific employers. Indeed, it even may have been directed at one particular employer planning to terminate its pension plan when its collective-bargaining agreement expired." *Id.* at 412 n.13.

In the years since *Energy Reserves*, this Court has found contractual impairments in *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987).[5] In each case the Court found that the impairment was justified by a legitimate and significant public purpose.

In *Exxon*, oil and gas producers challenged an Alabama statute that increased the severance tax on oil and gas and prohibited producers from passing on the increase to their customers. Many oil and gas companies had contracts that required purchasers to reimburse them for all severance taxes. In rejecting a Contract Clause challenge, this Court noted that the Contract Clause does not deprive the States of their broad power to adopt general

[5]In 1992 this Court unanimously rejected a Contract Clause claim on the grounds there was no impairment of a contract. *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (no impairment because no pre-existing agreement on specific worker's compensation terms at issue).

regulatory measures even if private contracts will be impaired or destroyed as a result.

*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), involved the Pennsylvania Subsidence Act that made coal mining operators responsible for surface damage caused by subsurface mining operations. The coal mining operators argued that this statute impaired the contractual waivers of liability they had received from surface owners. In upholding the Subsidence Act, the Court stressed the historical and textual contexts of the Contract Clause.

> The context in which the Contracts Clause is found, the historical setting in which it was adopted, and our cases construing the Clause, indicate that its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy.

*Id.* at 502-503 (citing *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934) and *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 445 (1934)).

The *DeBenedictis* Court concluded that the Subsidence Act did substantially impair the contractual waivers. It found, however, that Pennsylvania had "a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties." *Id.* at 505. As for the appropriateness of the Subsidence Act to achieve this public purpose, this Court deferred to the Pennsylvania legislature. "[W]e have repeatedly held that unless the State is itself a contracting party, courts should " 'properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Id.* at 505 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983)).

## III

### The Confusion in the Lower Courts About the Deference to be Shown State Legislative Judgments Under the Contract Clause Has Resulted in Conflicting Decisions and the Improper Invalidation of Franchise Protection Laws

Under the Contract Clause analysis articulated by this Court, it is difficult to fathom how lower courts can overlook or dismiss the strong public policy justification for franchise protection laws and hold that the Contract Clause bars their application to pre-existing franchise contracts. Franchising contracts are private and not public contracts. Franchises account for almost half of the retail economy and as a consequence hardly constitute "a narrow group." Franchise protection laws are not "special interest" legislation. The significant and legitimate public purpose behind such legislation has been recognized not only by more than a third of the States, but also by this Court and Congress. As this Court observed in the context of automobile franchises:

> "Dealers are with few exceptions completely dependent on the manufacturer for their supply of cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive of his manufacturer. The substantial investment of his own personal funds by the dealer in the business, the inability to convert easily the facilities to other uses, the dependence upon a single manufacturer for supply of automobiles, and the difficulty of obtaining a franchise from another manufacturer all contribute toward making the dealer an easy prey for domination by the factory. On the other hand, from the standpoint of the automobile manufacturer, any single dealer is expendable."

*New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 100 n.4 (1978) (quoting S. Rep. No. 2073, 84th Cong. 2d Sess., at 2 (1956)).

It appears that many courts in the franchising context are not deferring to legislative judgments about the reasonableness and appropriateness of this legislation. These courts often look to cases decided prior to *Energy Reserves*, *Exxon* and *DeBenedictis* and ignore the Contract Clause analysis articulated in these later cases. For example, the district court and court of appeals below relied on *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F.Supp. 248 (E.D.Wash. 1981), a case that relied on *Spannaus* and was decided before *Energy Reserves*. *Chico's Pizza* acknowledged that there was a legitimate state interest underlying the FIPA, but held that this interest was outweighed by the lack of various factors: "exigency," prior regulation in the field, an immediate "widespread social benefit," a "speculative or unsettled" franchise agreement, and "advance warning." Id. at 250. Most of the factors listed in *Chico's Pizza* find no mention in *Energy Reserves* or go to whether there was a substantial impairment and not whether that impairment is justified by "a significant and legitimate public purpose." Indeed, the *Chico's Pizza* court acknowledged that "[o]ver the long run, there may well be a presumption of widespread social benefit due to the regulatory action undertaken." *Id.*

This tendency to ignore *Energy Reserves* in the context of franchise protection laws is not limited to the Ninth Circuit's reliance on *Chico's Pizza* below. In *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041 (5th Cir. 1990), the Fifth Circuit held that a Louisiana statute that required a manufacturer to repurchase inventory after it terminated a dealership violated the Contract Clause when applied to a dealership established prior to passage of the statute. The dealer agreement gave the manufacturer the " 'option, but not the obligation, to repurchase'

products from the dealer." *Id.* at 1042. The Fifth Circuit's opinion has no discussion of the nature of the impairment, let alone of any public policy justifications for the legislation. The court simply applied a literal construction of the Contract Clause.

In contrast, when the district court for the District of North Dakota reviewed a similar provision under the criteria articulated in *Energy Reserves*, it concluded that retroactive imposition of a requirement to repurchase inventory was not a substantial impairment of the dealership contract. Moreover, it found any impairment justified.

> The state's strong interest in protecting distributors, coupled with the conclusion that courts will defer to legislative judgment to determine the appropriateness of the action taken to remedy the societal harm, *Energy Reserves Group, Inc.*, 459 U.S. at 413, . . . lends itself to the conclusion that [the North Dakota statute] does not violate the contract clause of the United States Constitution.

*Farmers Union Oil Co. v. Allied Products Corp.*, 162 B.R. 834, 841 (D.N.D. 1993).

The Fourth Circuit in *Morgan v. Kemper Ins. Co.*, 754 F.2d 145 (4th Cir. 1985), relied on its pre-*Energy Reserves* opinion in *Garris v. Hanover Ins. Co.*, 630 F.2d 1001 (4th Cir. 1980), in holding that a South Carolina statute could not be applied retroactively. The statute at issue in *Morgan* and *Garris* made it unlawful for an insurance company to terminate an agent for placing poor-risk automobile insurance that the agent was legally obligated to place. The *Garris* court concluded that the impairment was not justified because it was not a temporary measure tailored to remedy an emergency cause. *Id.* at 1008. Refusing to defer to the legislative judgment, the Fourth Circuit in *Garris* was not convinced that "the protections provided

insurance agents by this private right of action are necessary to insure that every licensed driver in the state will be able to procure liability insurance on a nondiscriminatory basis. . . ." *Id.* at 1010. The *Morgan* court merely adopted this reasoning without any discussion of intervening Supreme Court cases.

In 1993, the district court for the Southern District of Iowa ruled that an Iowa statute that applied the 1992 Iowa Franchise Act to existing franchise contracts was an unconstitutional impairment of these contracts under the Contract Clause. *McDonald's Corp. v. Nelson*, 822 F.Supp. 597 (S.D. Iowa 1993), *aff'd sub nom. Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied* , 513 U.S. 1032 (1994). The public purpose underlying the Iowa Franchise Act was supported by an extensive legislative history regarding the importance of franchising and the abuses in the industry. *Id.* at 608. Yet incredibly the district court did not find "a significant and legitimate public purpose" for the legislation. *Id.* at 609. The Eighth Circuit, while acknowledging some uncertainty about the meaning of this Court's more recent Contract Clause cases, then affirmed without any discussion of the legislative justification for the Act. *Holiday Inns Franchising*, 29 F.3d at 385. *See also Cloverdale Equipment Co. v. Manitowoc Engineering Co.*, 964 F.Supp. 1152, 1165 (E.D. Mich. 1997) (law requiring "just cause" termination of dealers "does not serve broad general purpose" because assists "certain" people and not society as a whole).

In *Anderson's Vehicle Sales, Inc. v. OMC-Lincoln*, 93 Mich.App. 404, 287 N.W.2d 247 (1979), the state appellate court held that a statutory "cause" requirement for terminations could be imposed on a pre-existing dealer agreement that did not require cause for termination. Subsequently two federal courts explicitly refused to follow the logic of *Anderson's Vehicle Sales, Inc.* and construed state franchise laws as prospective only

to avoid "serious" constitutional questions under the Contract Clause. In neither *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 715 F.2d 10 (1st Cir. 1983), nor *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.*, 794 F.2d 213 (6th Cir. 1986), did the court of appeals discuss the public purpose underlying the franchise protection laws.[6]

Confusion over the deference to be afforded state legislatures is so pronounced that there are disparate results in the same judicial district. In *N.A. Burkitt, Inc. v. J.I. Case Co.*, 597 F.Supp. 1086 (D.Me. 1984), the district court upheld the retroactive application of a statutory provision that a dealership had to be afforded a six-month opportunity to cure performance before being terminated for inadequate sales and service performance. The court observed that even if the statute was a substantial impairment of the dealership contract, there was adequate justification for the statute under the test this Court articulated in *Energy Reserves*:

> The State of Maine has delineated in the challenged section a significant and legitimate interest in regulating business practices within the state to eliminate the "unfair methods of competition and unfair and deceptive practices." . . . By so doing it can foster a salubrious and more stable business climate for *all* businesses with[in] Maine, thus aiding the state economy. Also important is the secondary benefit that inures to Maine consumers by prevention of arbitrary or hasty terminations of local dealerships.
>
> In assessing the reasonableness and necessity of a particular legislative measure, "courts properly defer

[6] *Scuncio Motors* involved a Rhode Island statute that made it unlawful to require a dealer to expand his facilities without guarantee of a sufficient supply of inventory to justify the expansion. *Dale Baker Oldsmobile* concerned a termination provision of the Michigan Motor Vehicle Act.

> to legislative judgment" unless the state itself is a contracting party. . . .

*Id.* at 1092 (citations omitted).

Ten years later the Maine district court again deferred to the legislature's retroactive protection of dealerships. *Acadia Motors, Inc. v. Ford Motor Co.*, 844 F.Supp. 819 (D.Me. 1994), *aff'd in part, rev'd in part on other grounds*, 44 F.3d 1050 (1st Cir. 1995), involved an amendment to Maine's dealership law that dictated the level of compensation dealers were to receive from auto manufacturers for warranty work.

> The disparity in bargaining power between automobile manufacturers and their dealers prompted the Maine Legislature to enact legislation to protect dealers from actions by manufacturers that were perceived as abusive and oppressive. . . . The Court finds that the Legislature's concern for protection of dealers and the public is a significant and legitimate public purpose to support § 1176. The means chosen by the Legislature to implement these purposes is also reasonable, "particularly in light of the deference to which the [State] Legislature's judgment is entitled." *Energy Reserves*, 459 U.S. at 418.

*Id.* at 827-828.

More recently, a third federal judge in the same judicial district refused to show the same deference to the Maine legislature. In *Rolec, Inc. v. Finlay Hydrascreen USA, Inc.*, 917 F.Supp. 67 (D.Me. 1996), the district court held it was unconstitutional to apply Maine's Franchise Laws for Power Equipment, Machinery & Appliances to a franchise agreement already in effect before the law was enacted. The franchisee was relying on the new law's prohibition against terminating a franchise without good cause. The district court not only expressed doubt that

the state had a significant and legitimate public purpose for its retroactive regulation, but it concluded that the legislation was not based upon reasonable conditions and of a character appropriate to the public purpose because "[t]he legislature could easily have fulfilled all its objectives by applying this new law to new franchise agreements in this previously unregulated area, but allowing a grace period—for example, six months—for existing franchise agreements to be terminated, failing which they would be subject to the new law." *Id.* at 69.[7]

The lack of deference often shown legislative judgments about the protection that should be extended to franchises is also inconsistent with the deference courts have afforded legislative judgments in other contexts. In *Mercado-Boneta v. Administracion del Fondo de Compensacion*, 125 F.3d 9 (1st Cir. 1997), the First Circuit considered a Puerto Rico statute that dissolved an insurance fund that otherwise would have covered a medical malpractice claim against a doctor. The doctor argued that this statute unconstitutionally impaired his contract with the insurance fund. The First Circuit concluded that there was

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[7]It is instructive to contrast *Rolec* with *Tiffany v. Sturbridge Camping Club, Inc.*, 32 Mass.App.Ct. 173, 587 N.E.2d 238 (1992). There the Massachusetts Court of Appeals held that a duty of good faith could be imposed retroactively pursuant to the Massachusetts Real Estate Time-Share Act regarding the manner in which the defendant suspended the plaintiffs' time-share arrangement. "A legislative impairment of contract will be upheld if reasonable and necessary to serve an important public purpose, and every rational presumption is indulged in favor of the statute's validity." *Id.* at 183 n.16, 244 n.16. The court had "no difficulty in discerning a rational public purpose . . ., if only to protect purchasers of time-share interests." *Id. See also Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 638 A.2d 1301 (1994) (retroactive application of statutory requirement that foreclosing mortgagee could not evict tenants absent good cause was not unconstitutional impairment of contracts); *Edgewater Investment Associates v. Borough of Edgewater*, 103 N.J. 227, 236, 510 A.2d 1178, 1183 (1986) ("legislative approach need be only rational, not perfect").

sufficient justification for the impairment because Puerto Rico was acting "to protect the legitimate interests of the public in having a well-functioning medical malpractice insurance system." Id. at 15. The First Circuit reached this conclusion despite the fact that the insurance fund was a public entity and its contract with the doctor arguably should have been subject to the higher level of scrutiny appropriate for public contracts.

In *Kraebel v. New York City Dept. of Housing Preservation and Development*, 959 F.2d 395 (2nd Cir.), *cert. denied*, 506 U.S. 917 (1992), the court of appeals considered a landlord's Contract Clause challenge to a municipal program that exempted certain qualified senior citizens from paying rent increases. The program provided that landlords would ultimately receive the full lease amount through tax abatements, but imposed a significant delay on the landlord's receipt of those rents. Nevertheless the Second Circuit concluded that there was no Contract Clause violation.

> Even assuming that the delays and burdens imposed on Kraebel's receipt of payments can be characterized as severe, there is a legitimate state purpose for the SCRIE program, and on balance, we conclude that Kraebel does not have a cognizable contract clause claim.

*Id.* at 403. *See also Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F.3d 985 (2nd Cir. 1997) (New York City law that imposed sweeping new termination provisions on existing garbage collection contracts with commercial businesses in New York did not violate Contract Clause).

The Fourth Circuit upheld a 1% across-the-board reduction in public employee salaries that was not authorized by their collective bargaining agreements in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012 (4th Cir.

1993), *cert. denied*, 510 U.S. 1141 (1994). In upholding what it conceded to be a substantial impairment of public contracts, the Fourth Circuit distinguished between the "complete deference" due legislative policy decisions affecting private contracts with the "at least some deference" that should be accorded legislative judgments affecting public contracts. *Id.* at 1019.

The deference often shown to state legislative judgments outside the context of franchising is possibly best illustrated by the Ninth Circuit itself. While it expressly relied on the 1979 pre-*Energy Reserves* opinion in *Chico's Pizza* to find that the Washington legislature's intended retroactive application of the FIPA was unconstitutional in this case, it expressly disowned its pre-*Energy Reserves* Contract Clause cases only a few months earlier in a non-franchising context. *Seltzer v. Cochrane*, 104 F.3d 234 (9th Cir. 1996), involved a Contract Clause challenge to retroactive application of a Nevada statute that exempted IRAs from bankruptcy. In arguing that the exemption should not apply to debts incurred prior to the passage of the statute, the bankruptcy trustee pointed to a series of Ninth Circuit opinions invalidating retroactive application of state exemption statutes.[8]

> The district court correctly noted, however, that these cases were decided before *Energy Reserves*, and thus did not give appropriate deference to legislative judgments. The Supreme Court in *Energy Reserves* instructed that "[u]nless the State itself is a contracting

[8]*See In re LaFortune*, 652 F.2d 842, 848 (9th Cir. 1981) (state law permitting homestead exemption without prior filing or recording); *In re Bassin*, 637 F.2d 668, 670 (9th Cir. 1980) (state law increasing the homestead exemption from $20,000 to $30,000); *England v. Sanderson*, 236 F.2d 641, 643 (9th Cir. 1956) (state law increasing homestead exemption from $7500 to $12,500).

> party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves*, 459 U.S. at 412-13, 103 S.Ct. at 705 (internal quotation and citation omitted). We have specifically recognized the shift in the law created by *Energy Reserves*. [*Nevada Employees Assn. v.*] *Keating*, 903 F.2d at 1226. "The Court [in Energy Reserves] retreated from its [prior case law]," and has "indicated a renewed willingness to defer to the decisions of state legislatures regarding the impairment of private contracts." *Id.*

104 F.3d at 236 (emphasis added).

## IV

## This is an Appropriate Case to Clarify the Deference to be Afforded Under the Contract Clause to State Legislative Judgments About the Reasonableness and Appropriateness of Legislation

This case does not involve the repudiation of a pre-existing debtor-creditor relationship, which is the historical antecedent of the Contract Clause. *See Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 502-503 (1987); *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting). The antidiscrimination provisions at issue do not directly contradict any contract provision and are consonant with the principles of uniformity, consistency and standardization that have been the hallmarks of franchising's success. The statute held unconstitutional by the Ninth Circuit, which made these antidiscrimination provisions retroactive, had been sanctioned by Washington law as "a fundamental policy of the State of Washington." RCW 19.100.900. The public interest underlying this legislation has been recognized in 17 states, the

opinions of this Court, and the reports of Congress.[9] Any suggestion that there is not a "significant and legitimate public purpose" for this legislation is simply disingenuous.

There is confusion in the courts below about the deference to be afforded the state legislature in determining the appropriateness and reasonableness of a particular measure. The standards articulated in the lower courts range from complete deference to a "rational basis" test to a variant of "a least restrictive means" test to no deference at all. There is obvious uncertainty in the lower courts about whether *Energy Reserves* articulated a new, more deferential test or merely reaffirmed *Spannaus*.

It has been more than a decade since this Court has addressed this issue and commentators agree that this Court's "current views on the Contract Clause are quite uncertain."[10] The resulting vacuum is being filled with judicial, and not legislative, judgments about the social utility of legislation. The various levels of deference being articulated by the lower courts are justifying the results and not yielding them. The result in this case reflects a judicial view that franchisees can protect themselves through the contracting process and that franchise abuses are not a serious social concern—presumably unlike timeshares, tenancies, rent increases, IRAs, garbage collection from

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[9]*Franchising in the U.S. Economy: Prospects and Problems*, Staff of H.R. Comm. on Small Business, 101st Cong., 2d Sess. 1-2, 74-76 (Comm. Print 1990).

[10]Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 Stan.L.Rev. 1373, 1461 n. 536 (1992). *See, e.g.*, Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U.Miami.L.Rev. 183, 211 (1985) (Court has not developed a cohesive doctrine); Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525, 545 (1987) ("Court's decisions are largely unpredictable"); Richard G. Taranto, Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L.J. 1623 (1980).

commercial businesses and other contexts where courts have found a legitimate public purpose.[11] Not only is this judgment naïve and inconsistent with the legislative judgment, but judges removed from the commercial arena are particularly ill suited to make this determination.[12] Given that many franchise contracts have terms of 20 years or more, results such as that below will isolate many franchisees, whose investment and dependency only grow with time, from the protections of state franchise legislation.[13]

## CONCLUSION

In 1994 the State of Iowa sought review of the Eighth Circuit's invalidation of provisions that applied the 1992 Iowa Franchise Act to existing franchise contracts. *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994). In its questions presented, Iowa asked how franchising statutes could be invalidated without any discussion of their public purpose, why prohibiting unfair or abusive

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[11] *Cf.* Emerson, *supra* note 1, at 926-27 (regulation found in many states reflect legislative and administrative recognition of franchisor's potentially abusive bargaining leverage over franchisees; nevertheless, some courts adopt doctrinaire approach to "sanctity of contract").

[12] *See*, Staff of H.R. Comm. on Small Businesses, *supra* note 9, at 49:

> Advantages of financial strength, access to information and to legal advice create a gross disparity of bargaining power in favor of the franchisor that results in one-sided franchise agreements that are offered, and generally accepted, on a take-it-or-leave-it basis. Throughout the relationship, the franchisor's ability to terminate a franchise, and with it a franchisee's investment and potential livelihood, can easily become an ability to dictate or coerce behavior and compliance. Even after a franchise is terminated, the franchisee remains at a serious legal and financial disadvantage in attempting to seek redress in court.

[13] Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 Stan.L.Rev. 927, 951-55 (1990) (potential franchisee less vulnerable to abuses than established franchisees).

practices was not a legitimate public purpose, and how statutes could be invalidated without consideration of the precise contractual rights at issue. 63 U.S.L.W. 3396. *Holiday Inns Franchising* was inappropriate for review in this Court because it involved a facial challenge to the retroactive application of a broad range of franchise reforms involving transfers, encroachments, terminations and removal. *New York State Club Assn. v. New York City*, 487 U.S. 1, 11 (1988); *Watson v. Buck*, 313 U.S. 387, 402 (1941).

The instant case demonstrates that the issues raised in *Holiday Inns Franchising* will recur. Unlike *Holiday Inns Franchising*, however, the Contract Clause issue here is narrow and well-defined. This is an appropriate case in which to address the important question of the deference due state legislative judgments under the Contract Clause. Without guidance from this Court, the ability to address effectively social and economic problems that affect private contracts will turn on the predilection of individual judges in a manner reminiscent of *Lochner v. New York*, 198 U.S. 45 (1905). Given the importance of franchise protection legislation and the profound confusion about the deference to be afforded state legislative judgments under the Contract Clause, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: April 10, 1998

# APPENDIX

**APPENDIX A**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 96-35605
96-35634
96-35905

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D.C. No. CV-93-01077-BJR
MEMORANDUM*

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Cassan Enterprises, Inc.; CMC Investments, Inc.;
Todd Investment Company,
Plaintiffs-Appellees/Cross-Appellants,

v.

Dollar Systems, Inc.; Dollar Rent-a-Car Systems, Inc.;
Pentastar Transportation Group, Inc.,
Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

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Argued and Submitted October 8, 1997

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Seattle, Washington

Before: WRIGHT, SKOPIL and TROTT, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appellant, a car rental franchisor doing business as Dollar Systems, appeals the district court's denial of its renewed motion for judgment as a matter of law. Appellant's motion followed a jury verdict awarding damages to a franchisee for two violations of the Washington State Consumer Protection Act, and the issuance of two injunctions. Appellee franchisee, Cassan, appeals the district court's grant of summary judgment against its Washington State Franchise Investment Protection Act claim. We reverse the jury verdict and vacate the first injunction. We affirm the grant of summary judgment, reverse an award of attorney's fees, and remand the second injunction for reconsideration.

We review de novo the district court's denial of a renewed motion for judgment as a matter of law. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F. 3d 1422, 1430 (9th Cir. 1996). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's conclusion. *Id.*

## I Bid Assistance Claim

### A. Duty of Good Faith and Fair Dealing

The existence of a duty of good faith and fair dealing is a question of law, *Reid v. State Farm Mut. Auto. Ins.*, 218 Cal.Rptr. 913, 921 (Cal. Ct. App. 1985). Review is de novo.

The duty of good faith and fair dealing assures only that parties do not act in bad faith when carrying out discretionary contractual duties; it cannot be extended to create entirely new contractual duties not contemplated by the parties. *Racine & Laramie, Ltd. v. California Dep't of Parks & Recreation*, 14 Cal.Rptr. 2d 335, 339 (Cal. Ct. App. 1993). *See also, Carma Developers, Inc. v. Marathon Development California, Inc.*, 826 P.2d 710, 726-27 (Cal. 1992).

No express provision of the Dollar-Cassan franchise agreement gives Dollar discretionary power, on which a duty of good faith could be based, to reduce their franchise fee or otherwise support an airport concession bid.

A California court may find an implied contract provision only if: (1) the implication either arises from the contract's express language or is indispensable to effectuating the parties' intentions; (2) it appears that the implied term was so clearly within the parties' contemplation when they drafted the contract that they did not feel the need to express it; (3) legal necessity justifies the implication; (4) the implication would have been expressed if the need to do so had been called to the parties' attention; and (5) the contract does not already address completely the subject of the implication. *Frankel v. Bd. of Dental Examiners*, 54 Cal.Rptr. 2d 128, 134 (Cal. Ct. App. 1996). Appellee did not present evidence at trial to support a finding that any of these five conditions for implying a contract term was satisfied. In any case, the franchise agreement contains waiver and integration clauses. There, neither Dollar's prior waivers of franchise fees with respect to other franshisees nor its oral promises to support Cassan's license bid may amend the franchise agreement. *See, e.g., Payne v. McDonald's Corp.*, 957 F. Supp. 749, 756 (D. Md. 1997).

The promise by Dollar's president to support Cassen was too indefinite to permit judicial enforcement as a separate contract. "[I]t is plain that where the promisor retains the unlimited right to decide later the nature or extent of his performance the promise is illusory." *Beverage Distributors, Inc., v. Olympia Brewing Co.*, 440 F.2d 21, 30 (9th Cir. 1971). *See also, Aguilar v. International Longshoreman's Union Local #10*, 966 F.2d 443, 446 (9th Cir. 1992) ("a promise that is 'vague, general or of indeterminate application' is not enforceable") (citations omitted).

Because it had no legal obligation to provide Cassan with bid assistance, Dollar was entitled to judgment as a matter of law on Cassan's claim under the duty of good faith and fair dealing.

### B. Washington State Consumer Protection Act Claim

Whether an action gives rise to a Washington State Consumer Protection Act ("Washington CPA") violation is reviewable as a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 930 P.2d 288, 297 (Wash. 1997).

#### 1. Elements of a Washington CPA Claim

The Washington CPA, Wash. Rev. Code 19.86.090, provides a private right of action for a "person who is injured in his or her business or property by a violation of Wash. Rev. Code 19.86.020," which in turn prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." The five elements of a claim are: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce; (3) public interest impact; (4) injury to the plaintiffs; (5) and causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 535-39 (Wash. 1986).

The Washington Supreme Court has held that a plaintiff may establish the first element of a Washington CPA claim either by showing a *per se* unfair act based on violation of a statute, or by showing that "an act or practice has a capacity to deceive a substantial portion of the public." *Saunders v. Lloyd's of London*, 779 P.2d 249, 256 (Wash. 1989); *Hangman Ridge*, 719 P.2d at 535. The district court held in a pretrial order that Cassan could not show that Dollar engaged in a *per se* unfair act. We hold that Dollar's refusal to reduce its franchise fee and support Cassan's airport license bid in the manner and to the extent expected by Cassan did not have the capacity to deceive a substantial portion of the public, and Dollar was entitled to judgment as a matter of law on the Washington CPA claim.

The promise to support the bid was made only to the owners of Cassan, in a context unlikely to lead to deception of others. Isolated communications are not likely to deceive a substantial portion of the public unless they are part of a standard form contract or a standard sales representation. *Henery v. Robinson*, 67 Wash. App. 277, 834 P.2d 1091, 1098 (Wash. Ct. App. 1992). Representations by a franchisor to its franchisee are unlikely to have a "deceptive capacity affecting the public in general." *See Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 935 P.2d 628, 635 (Wash. Ct. App. 1997).

**2. Jury Instructions on CPA Claim**

As an initial matter, we note that Dollar sufficiently preserved this issue for review through appropriate objections to the jury instructions at trial. It proposed an instruction, which while improperly labelled "Deceptive Act or Practice," contained the appropriate "capacity to deceive a substantial portion of the public" standard. Dollar later objected to the court's failure to submit the instruction or any other guidance on what a plaintiff must show to establish an "unfair or deceptive act."

We review de novo whether the instructions fail to define an element to be proved at trial. *Fireman's Fund Ins. Co. v. Alaskan Pride Partnership*, 106 F.3d 1465, 1469 (9th Cir. 1997).

The instructions on the Washington CPA claim were incorrect. The Washington Pattern Instructions on the Washington CPA, WPI 310.08, require an instruction that an "unfair or deceptive act" may be shown by a *per se* unfair violation of statute or by alleging an act that "has the capacity to deceive a substantial portion of the public." There is a strong probability that the jury would not have found a violation of the Washington CPA had it been properly instructed.

The failure of the court to present an instruction to the effect that "[o]nly acts that have the capacity to deceive a substantial

portion of the public are actionable," *Goodyear Tire*, 935 P.2d at 635, was reversible error because the instruction given failed to define an essential element of the claim. *See Jordan v. Atchison, Topeka & Santa Fe Ry. Co.*, 934 F.2d 225, 228-29 (9th Cir. 1991) (jury instruction misstating law is reversible error); *Little Oil Co. v. Atlantic Richfield Co.*, 852 F.2d 441, 444 (9th Cir. 1988) (jury instructions reviewed for adequate instruction on each element of the case).

## II Advertising Claim

### A. Breach of Contract

The franchise agreement is governed by California law. According to California law, specific provisions of a contract trump general provisions of the contract. *See* 1 Witkin, Summary of California Law (Contracts) §695 (9th ed. 1987 & Supp. 1996). Appellants could not breach their general responsbility to provide cars on "most favorable terms available" through an exercise of their specific and unambiguous right to control the use of their trademarks in the advertising of its franchisees.

We hold that appellants are entitled to judgment as a matter of law. No jury could reasonably find that their exercise of their clearly expressed contractual right to control the advertising of their franchisees in the effort to unify their image through a new trademark advertising policy were a breach of their contract. *See e.g., Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 207 (6th Cir. 1995).

### B. Tortious Interference

In California, "a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 751

(Cal. 1995).[1] Because "[a] doctrine that blurs the analytical line between interference with an existing contract and interference with commercial relations less than contractual is one that invites both uncertainty in conduct and unpredictability of its legal effect," California courts have been admonished to "firmly distinguish" claims of tortious interference with contract and claims of tortious interference with prospective economic advantage. *Della Penna*, 902 P.2d at 751. The latter requires a showing that the interference was independently wrongful. The former does not. *Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co.*, 54 Cal.Rptr.2d 888, 895 n.2 (1996).

Here, Cassan cannot allege an enforceable contract for advertising allowances with GM because the consent of Dollar was a condition precedent to such an agreement. Thus, Cassan must show that Dollar wrongfully interfered with its prospective economic advantage. *PMC, Inc. v. Saban Entertainment, Inc.*, 52 Cal.Rptr.2d 877, 891 (1996); *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners*, 60 Cal. Rptr.2d 830, 838-39 (1997). This it cannot do.

While the California Supreme Court declined to delineate the meaning of "wrongful interference" in *Della Penna*, the state

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[1] *Della Penna* was decided two months after the jury verdict in this case, but several months prior to the order denying defendant's renewed motion for judgment as a matter of law. In diversity cases based on state law claims, we are bound to follow the law of the state as it stands at the time we enter our order of affirmance or reversal. *Vanderbark v. Owens-Illinois Co.*, 311 U.S. 538, 541-42 (1940). We find no prejudice to Cassan in following *Della Penna*. In holding that its decision was retroactive, the California Supreme Court noted that "litigants and counsel could have foreseen that a change in the rules regulating the pleading and burden of proof requirements in economic relations litigation was in the wind well before the time this case was tried in 1992." *Della Penna*, 902 P.2d at 750 n.4. In fact, Dollar objected at trial to the lack of a jury instruction similar to its proposed jury instructions which included "improper" or "wrongful" interference as an element to be proven by Cassan.

court of appeals has repeatedly held that exercise of a contractual right is not wrongful. *Arntz Contracting*, 54 Cal.Rptr.2d at 896; *Rickel v. Schwinn Bicycle*, 192 Cal.Rptr. 732, 740 (Cal. Ct. App. 1983). Furthermore, even if Dollar's refusal to consent to the advertising agreement was a breach of its franchise agreement with appellee, "a contracting party's unjustified failure or refusal to perform is a breach of contract, and cannot be transmuted into tort liability by claiming that the breach detrimentally affected the promisee's business." *Arntz Contracting*, 54 Cal.Rptr.2d at 896.

### C. Consumer Protection Act

No jury could reasonably find that Dollar's refusal to consent to its advertising agreement with GM had the capacity to deceive a substantial portion of the public, or that there was any public interest in what was essentially a contract dispute between a franchisor and a franchisee. *See Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 935 P.2d 628, 635 (Wash. Ct. App. 1997).

Because Cassan failed to establish two of the necessary elements of a Washington CPA action, its advertising claim based on the CPA must be reversed as a matter of law.

## III Injunctions

Both injunctions were based on the jury finding that Dollar violated the Washington CPA in refusing to consent to Cassan's advertising agreement with GM, which we reverse as a matter of law. Because we see no alternative basis for imposition of the first injunction in the record, it must be vacated. We remand to the district court, however, for a determination whether the second injunction may be based on a provision of the Todd-Dollar franchise agreement which gave Cassan's owners the right "to operate a separate leasing company entitled Dollar Leasing . . . without any fees or restrictions."

Dollar challenges the second injunction, contending that the court lacked subject matter jurisdiction to grant it because the notice of appeal had been filed. They filed their notice of appeal on May 22, 1996, and the court granted the second injunction on July 9, 1996. The notice of appeal was not yet effective when filed, however, because the motion to amend the injunction, which qualified as a Rule 59 motion, was pending. *See* Fed. R. App. P. 4(a) (4) (C). The notice of appeal had not yet divested the court of jurisdiction. *Lewis v. U.S. Postal Serv.*, 840 F.2d 712, 714 (9th Cir. 1988); *Cobb v. Miller*, 818 F.2d 1227, 1237 (5th Cir. 1987).

Dollar next argues that the motion to amend the injunction was untimely. Because the motion was filed while a posttrial motion for judgment as a matter of law or for a new trial was pending, it was timely. Fed. R. Civ. P. 4 (a) (4) (A). This court reviews for abuse of discretion the court's determination that the motion was timely. *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). Because there were several motions already pending, the court did not abuse its discretion by entertaining this motion.

## IV Cross-Appeals

### A. Summary Judgment on Franchise Claim

As an initial matter, we note that we have subject matter jurisdiction over this appeal. *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975) (Risk that cross-appellants might become aggrieved upon reversal on direct appeal is sufficient to provide standing for cross-appeal of nonfinal order where final order was entirely favorable to cross-appellants.).

In its complaint, Cassan challenged Dollar's denial of bid assistance as a violation of Washington's Franchise Investor Protection Act ("FIPA"), Wash. Rev. Code § 19.100.010. The court dismissed this claim on Dollar's motion for partial summary judgment, concluding that retroactive application of FIPA to the franchise agreement here would violate the Contracts

Clause of the United States Constitution, art. I, § 10, cl. 1. We review de novo a grant of summary judgment. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Because we agree that retroactive application of FIPA to the franchise agreement would violate the Contracts Clause, we affirm the judgment of the district court.

Interference with a private agreement implicates the Contracts Clause when: (1) there is a contractual relationship; (2) a change impairs the contract; and (3) the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). The Clause prohibits such impairments unless legitimate governmental interests justify them. *Northwestern Nat'l Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980).

The court found FIPA's interference both substantial and insufficiently justified. It relied for these conclusions on *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F. Supp. 248, 249-50 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982). We agree.

### B. Evidentiary Ruling on Financial Statements

Cassan's owners argue that the court erred in ruling that their personal financial statements could be admitted to rebut any claims of financial hardship they might make. As the statements were never admitted and will be irrelevant on remand, this issue is moot and we decline to reach it.

## V Attorney's Fees

As the district court's award of attorney's fees was based on the jury verdicts on the Washington CPA claims that we have reversed, it too is reversed. Each party shall bear its own costs on appeal.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

Filed: November 28, 1997

## APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C93-1077R

Order on Pending Motions

Cassen Enterprises, Inc.,
CMC Investments, Inc., and
Todd Investment Company,
Plaintiffs,

v.

Dollar Systems, Inc., Dollar
Rent-A-Car Systems, Inc., and
Pentastar Transportation Group,Inc.,
Defendants.

THIS MATTER comes before the court on several motions by plaintiffs and defendants. Having considered all the pleadings and other documents filed in support and in opposition to the motions, the court finds and rules as follows:

## I. BACKGROUND

Plaintiff Cassan Enterprises, Inc. ("Cassan") operates a daily rental car franchise in the state of Washington and is a franchisee of defendant Dollar Rent-A-Car Systems, Inc. ("Dollar California"). Plaintiff CMC Investments, Inc. ("CMC") is Cassan's sub-franchisee and wholly-owned subsidiary.[1] Todd Investment Company ("Todd") is an Oregon corporation which is also a

[1]Plaintiffs Cassan and CMC are referred to collectively as "Cassan" in this order.

franchisee of Dollar California. Dollar California is owned by defendant Pentastar Transportation Group, Inc. ("Pentastar"). Pentastar also owns Dollar Systems, Inc., Thrifty Rent-A-Car System, Inc., and Snappy Car Rental, Inc. Thrifty licenses daily rental car franchises in Washington and Oregon. Snappy operates company-owned daily rental car operations in Washington and Oregon. Pentastar itself is a wholly-owned subsidiary of Chrysler Corporation.

Pentastar acquired Dollar[2] in August, 1990. Shortly after that time Dollar wrote to Cassan indicating that franchisees would not be permitted to advertise the Dollar logo with General Motors cars. Beginning in September or October, 1991 Cassan was not permitted to obtain advertising funds from General Motors, as it had done in the past. Several other Dollar franchisees were permitted to obtain advertising money from General Motors for the 1992 model year.

Cassan and Todd have asserted various claims against the defendants. In the pending motions, defendants move for summary judgment on the following: plaintiffs' tort claims; plaintiffs' claims under the Washington Franchise Investment Protection Act, RCW 19.100.180 *et seq.*, ("the FIPA"), and on the plaintiffs' claims concerning their airport car rental concession. Plaintiffs have moved for reconsideration of the court's ruling concerning the plaintiffs' exclusivity claim and to consolidate this action with a related case, C94-1121R, which involves some of the same parties.

## II. DISCUSSION

### A. Summary Judgment Standard

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing

[2]In this order, the court refers to the various Dollar entities collectively as "Dollar."

party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn.*, 809 F.2d 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985).

**B. FIPA Claims**

As noted above, defendants have moved for summary judgment on Cassan's claims under the Washington Franchise Investment Protection Act, RCW 19.100.180 *et seq.*, ("the FIPA"). The franchise agreement provides for the application of California law. Under Washington law, contractual choice of law provisions are to be "given effect so long as the chosen law does not violate the fundamental public policy of Washington." *McGowan v. Pillsbury Co.*, 723 F.Supp. 530, 537 (W.D. Wash. 1989), citing *McGill v. Hill*, 31 Wash.App. 542, 548, 644 P.2d 680 (1982); *Rutter v. BX of TriCities, Inc.*, 60 Wash.App. 743, 746, 806 P.2d 1266 (1991).

Unlike California, Washington State has enacted a comprehensive statute governing the franchisor-franchisee relationship, the Franchise Investment Protection Act (the "FIPA"), RCW 19.100.180 *et seq.* Defendants do not dispute that Washington public policy would require the application of the FIPA. However, defendants argue that the FIPA is not applicable because the Contracts Clauses of the United States Constitution and the Washington State Constitution prohibit the application of the FIPA to Cassan's franchise agreement. The Contracts Clause of the U.S. Constitution reads as follows: "No State shall [pass any] Law impairing the Obligation of Contracts. . ." Art. I, Sec. 10, Clause 1. The parallel Washington Constitution clause states that "[no] law impairing the obligation of contracts shall ever be passed." Art. I, Sec. 23. Defendants argue that because the franchise agreement in question was formed in 1967 and the FIPA was not enacted and did not become effective until several

years later, that application of the FIPA to this contract would unconstitutionally impair Dollar's rights.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court set out the analysis to be followed when considering laws which allegedly impair contracts. First, the state law must "operate[] as a substantial impairment of a contractual relationship." *Id.* at 244. If such an impairment is found, then the court must weigh the following factors against the state's interest in order to assess the propriety of permitting the exercise of the state's police powers retroactively: (1) the need for "disruption of contractual expectations. . . to meet an important general social problem," *Id.* at 247; (2) whether the law was "enacted to protect a broad societal interest rather than a narrow class," *Id.* at 249; (3) whether the state had previously regulated the field, *Id.*; (4) whether the law "effect[ed] simply a temporary alteration of the contractual relationships of those within its coverage, [or] worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively," *Id.* at 250; and (5) reliance on the previous state of the law. *Id.* at 246.

The issue of whether the FIPA unconstitutionally impairs franchise contracts which were entered into prior to its effective date has been addressed by another federal court in Washington State. In *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F.Supp. 248 (E.D. Wash. 1981), *aff'd without op.*, 685 F.2d 440 (9th Cir. 1982), the court held that application of the FIPA to a pre-existing franchise agreement would violate the Contracts Clause. *Chico's Pizza*, 544 F.Supp at 250. This court agrees. Application of the FIPA to the contract between Dollar and Cassan would substantially impair Dollar's contractual rights because it would alter the reasonable expectations of the parties. The FIPA was addressed at only a narrow class, not a general or broad societal problem; the state had not previously regulated franchises in this

manner; the contractual relationship between franchisor and franchisee was changed in a severe and permanent manner by the FIPA; the contract between Cassan and Dollar appears to be the result of bargaining by the parties; and throughout the years since the contract was signed, the parties appear to have relied upon its terms. Accordingly, the FIPA cannot constitutionally be applied to the contract entered into by Cassan and Dollar prior to its enactment. *See also Birkenwald Distrib. Co. v. Heublein, Inc.*, 55 Wash.App. 1, 8, 10, 776 P.2d 721 (1989) (holding that applying the Wholesale Distributor/Supplier Equity Agreement Act to distribution agreements preceding its enactment would unconstitutionally impair contractual obligations); *Wipperfurth v. U-Haul Co. of Western Wisconsin, Inc.*, 101 Wis. 2d 586, 598, 304 N.W.2d 767, 773 (1981) (holding that retroactive application of the Wisconsin Fair Dealership Law would unconstitutionally impair contracts); *Globe Liquor Co. v. Four Roses Distillers Co.*, 281 A.2d 19, 21 (Del. 1971), *cert. denied*, 404 U.S. 873 (1971) (holding that the Delaware Franchise Security Law could not constitutionally be applied to contracts formed prior to the law's effective date). Therefore, Dollar's motion for summary on plaintiffs' FIPA claims is GRANTED.[3]

### C. Airport Concession Issue

Defendants move for summary judgment on Cassan's claim of discrimination with regard to financial support from Dollar to help maintain Cassan's full-service airport concession. Cassan asserts that defendants discriminated against it in violation of the FIPA. Because the court has found that the FIPA cannot constitutionally be retroactively applied to the contract between Cassan and Dollar, Dollar's motion for summary judgment on the claim

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[3]Because Cassan appears to assert that Pentastar violated the FIPA only in the context of alleged unlawful competition, which the court addresses separately below in Section II.E., the court finds it unnecessary to rule on the applicability of the Contracts Clause to claims against Pentastar.

of discrimination relating to the airport concession issue must be GRANTED.

**D. Tort Claims**

In addition to the above motions, defendants move for summary judgment on Cassan's and Todd's tort claims. The parties agree that California law applies to these claims, pursuant to the choice of law clauses in each of the franchise contracts. Defendants argue that the California statute of limitations of two years bars the plaintiffs' claims. Under California law, a cause of action does not accrue until the plaintiff suffers "appreciable harm." *Budd v. Nixen*, 6 Cal.3d 195, 200, 491 P.2d 433, 436 (1971); *see also Slavin v. Trout*, 18 Cal.App. 4th 1536 (1993), *rev. denied*, 1994 Cal. LEXIS 151 (Cal. Jan. 13, 1994). The court finds that plaintiffs did not suffer appreciable harm from the allegedly unlawful events until September or October 1991 when they were not permitted to accept 1992 model year advertising money from General Motors. Thus, plaintiffs' complaint, served on defendants in July, 1993, was timely.

The court also finds that plaintiffs' claims of conversion and tortious interference with business/contractual relations have raised genuine issues of material fact and therefore survive summary judgment. The court finds that California law does not categorically preclude *all* claims of conversion of intangible property. *See A & M Records, Inc. v. Heilman*, 75 Cal.App. 3d 554, 569 (1977), *cert. denied*, 436 U.S. 952 (1978). In addition, the court finds that plaintiffs have presented evidence which raises a substantial issue of material fact concerning whether the terms of the franchise agreements permit Dollar to restrict the use of the Dollar service marks and logos in the manner alleged to have occurred. The court finds that, in light of the language of the contract and the actions of the parties throughout the 25 years in which there was no controversy, *see Kennecott Corp. v. Union Oil Co.*, 196 Cal.App. 3d 1179 (1987), plaintiffs have raised a

substantial issue of material fact as to whether defendants have violated their implied convenant of good faith and fair dealing. *See California Lettuce Growers, Inc. v. Union Sugar Co.*, 45 Cal.2d 474, 484, 289 P.2d 785 (1955). Accordingly, defendant's motion for summary judgment on plaintiffs' claims of conversion and tortious interference with business/contractual relations is DENIED.

The court agrees with defendants that the California Business and Professions Code Sections 17200 *et seq.* and Sections 17500 *et seq.* do not provide a private right of action for damages for unfair business practices. *See Little Oil Co. v. Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988). However, according to the California Supreme Court, private parties may seek injunctive relief for unfair business practices. *Chern v. Bank of America*, 15 Cal. 3d 866, 875, 544 P.2d 1310, 1315 (1976). Therefore, defendants' motion for summary judgment on plaintiffs' claim of unfair business practices is GRANTED as to any claim for damages and DENIED as to any claim for injunctive relief. In addition, it appears that plaintiffs are not asserting a separate claim for "intent to destroy plaintiffs' business" but rather that plaintiffs have alleged such facts in support of their claim for punitive damages. Therefore, the court finds it unnecessary to rule on defendants' motion for summary judgment on an "intent to destroy business" claim.

**E. Motion to Reconsider Exclusivity Ruling**

Plaintiffs have moved for this court to reconsider its September 1, 1994 ruling on the issue of exclusivity and alleged unlawful competition by Pentastar. The FIPA precludes competition by a franchisor, "[i]f the franchise provides that the franchisee has an exclusive territory." RCW 19.100.180(2)(f). This court found, in its previous order, that the contract language created an exclusive franchise in various counties for a "Dollar-A-Day" rental car agency, which was later shortened to "Dollar."

Pentastar's ownership and operation of other non-Dollar rental car agencies does not violate the contractual exclusivity provision, nor the statutory non-compete provision. Therefore, plaintiffs' motion to reconsider is DENIED.

### F. Motion to Consolidate

Plaintiffs have moved to consolidate the present case with another related action, C94-1121R, which involves some of the same parties. Consolidation is a matter within the discretion of the court. *See A.J. Industries, Inc. v. United States District Court for Cent. Dist.*, 503 F.2d 384, 389 (9th Cir. 1974). In determining whether to consolidate, " a court weighs the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation." *Southwest Marine, Inc. v. Triple A Machine Shop, Inc.*, 720 F.Supp. 805, 807 (N.D.Cal. 1989). This court finds that judicial convenience in this matter does not weigh in favor of consolidation. The lack of judicial convenience, combined with the delay which would be incurred by consolidating the cases at this time, causes this court to DENY plaintiffs' motion to consolidate.

## III. CONCLUSION

Based on the foregoing, the court hereby rules as follows: Dollar's motion for summary on plaintiffs' FIPA claims is GRANTED; Dollar's motion for summary judgment on the airport concession discrimination issue is GRANTED; defendant's motion for summary judgment on plaintiffs' claims of conversion and tortious interference with business/ contractual relations is DENIED; defendants' motion for summary judgment on plaintiffs' claim of unfair business practices is GRANTED as to any claim for damages and DENIED as to any claim for injunctive relief; plaintiffs' motion to reconsider is DENIED; and plaintiffs' motion to consolidate is DENIED.

DATED at Seattle, Washington this 3rd day of November, 1994.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Cassen Enterprises, Inc.;
CMC Investments, Inc.;
Todd Investment Company,
Plaintiffs-Appellees/Cross-Appellants,

v.

Dollar Systems,Inc.; Dollar
Rent-A-Car Systems, Inc.;
Pentastar Transportation Group, Inc.,
Defendants-Appellants/Cross-Appellees.

Before: WRIGHT, SKOPIL and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

Filed: January 13,1998

## APPENDIX D

## PERTINENT PROVISIONS OF WASHINGTON FRANCHISE INVESTMENT PROTECTION ACT

**RCW 19.100.180. Relation between franchisor and franchisee—Rights and prohibitions.**

Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and the franchisees:

(1) The parties shall deal with each other in good faith.

(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to:

. . . .

(b) Require a franchisee to purchase or lease goods or services of the franchisor or from approved sources of supply unless and to the extent that the franchisor satisfies the burden of proving that such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds, and do not substantially affect competition: *Provided*, That this provision shall not apply to the initial inventory of the franchise. In determining whether a requirement to purchase or lease goods or services constitutes an unfair or deceptive act or practice or an unfair method of competition the courts shall be guided by the decisions of the courts of the United States interpreting and applying the anti-trust laws of

the United States.

(c) Discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless and to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is: (i) Reasonable, (ii) based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time, or is based on other proper and justifiable distinctions considering the purposes of this chapter, and (iii) is not arbitrary. However, nothing in (c) of this subsection precludes negotiation of the terms and conditions of a franchise at the initiative of the franchisees.

**RCW 19.100.190. Unfair or deceptive acts—Suits for damages—Violations of other acts, use in evidence.**

(1) The commission of any unfair or deceptive acts or practices or unfair methods of competition prohibited by RCW 19.100.180 as now or hereafter amended shall constitute an unfair or deceptive act or practice under the provisions of chapter 19.86 RCW.

**RCW 19.100.220. Exception or exemption—Burden of proof—Waivers of compliance void—Settlement release or waiver--Chapter as fundamental policy**

. . . .

(3) This chapter represents a fundamental policy of the State of Washington.

**RCW 19.100.900. Chapter applicable to existing and future franchises and contracts.**

The provisions of this chapter shall be applicable to all franchises and contracts existing between franchisors and franchisees and to all future franchises and contracts.

## PERTINENT PROVISIONS OF WASHINGTON CONSUMER PROTECTION ACT

**RCW 19.86.020. Unfair competition, practices, declared unlawful.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

**RCW 19.86.090. Civil action for damages—Treble damages authorized—Action by governmental entities.**

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, . . . may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: *Provided*, that such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars. . . .

## APPENDIX E

## OFFICE OF THE ATTORNEY GENERAL

SLADE GORTON ATTORNEY GENERAL

DEXTER HORTON BUILDING
SEATTLE, WASHINGTON 98104

April 23, 1971

Honorable Robert Curtis
Chairman, Business & Professions Committee
House of Representatives
Olympia, Washington 98501

Dear Representative Curtis:

As you know, *ESB 755*, which is the companion bill to HB 938, the proposed Franchise Investment Protection Act, has passed the Senate. The bill as it passed the Senate is essentially identical to HB 938 as considered by the Business & Professions Committee several weeks ago. Besides some minor amendments, however, there is one important change that may relieve some of the problems with the bill expressed by members of your committee.

On page 1, Line 21-23 of ESB 755, the definition of "franchise" has been amended by adding the words, "and in which the franchisee is required to pay, directly or indirectly, a franchise fee". Then on Page 2, Line 9, a new subsection (10) has been added defining "franchise fee". Although franchise fee is broadly defined, there are six specific exceptions which basically involve the wholesale purchase or equivalent from the franchisor of merchandise and the purchase or lease of the necessary property, fixtures and supplies. The purpose of these amendments was to solve the dilemma raised by questions from members of the Business & Professions Committee in the

hearing on HB 938, that is, if franchise is defined very broadly then some business transactions that admittedly are not within the intended scope of the act are in danger of being included while if the definition of franchise is too narrow, then the experience of other states indicates that some franchising operations which is very definitely should be within the regulation can avoid the scope of the act by changing their procedures.

These amendments were the result of the joint efforts of this office and the Association of Washington Business. It is our belief that we have managed to resolve the above described dilemma. We feel that under these amended definitions most of the various business transactions that in practice amount to a form of distributorship would not be subject to the law while most true franchising operations in the usual sense of that term, would be.

I cannot overemphasize the urgent need for this legislation that I expressed at the committee hearing. The alarming trend of increase in the incidence of unscrupulous franchising operations in this state can only be expected to accelerate in this time of unemployment with increasing numbers of persons desperately attempting to "buy a job".

Thank you for your consideration of this matter. I hope that these amendments to ESB 755 (HB 938) will meet with your approval.

Very truly yours,

FOR THE ATTORNEY GENERAL

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Assistant Attorney General
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WHC:blk

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Supreme Court, U.S.
FILED
MAY 15 1998
OFFICE OF THE CLERK

No. 97-1669

# IN THE
# SUPREME COURT OF THE UNITED STATES
# OCTOBER TERM, 1997

---

CASSAN ENTERPRISES, INC., ET AL.,
*Petitioners,*

v.

DOLLAR SYSTEMS, INC., ET AL.,
*Respondents.*

---

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the lower courts properly determine that application of Washington State's Franchise Investment Protection Act to the contract between Dollar and Cassan would impair Dollar's contractual rights in violation of the Contract Clause of the U. S. Constitution?

## PARTIES TO THE PROCEEDINGS

Dollar adopts Cassan's statement on page ii of the Petition, as to the petitioners only.

Respondents Dollar Systems, Inc. and Dollar Rent A Car Systems, Inc. have merged and are currently known as Dollar Rent A Car Systems, Inc. ("Dollar"). Dollar is a wholly-owned subsidiary of Respondent Dollar Thrifty Automotive Group, Inc., formerly known as Pentastar Transportation Group, Inc. ("Pentastar"). Since December 1997, Dollar Thrifty Automotive Group, Inc. has been a publicly traded company and is no longer a subsidiary of Chrysler Corporation.

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No. 97-1669

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CASSAN ENTERPRISES, INC., ET AL.,
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DOLLAR SYSTEMS, INC., ET AL.,
*Respondents*.

---

**BRIEF IN OPPOSITION TO**
**PETITION FOR WRIT OF CERTIORARI**

## I. STATEMENT OF THE CASE

This garden variety diversity case involves a commercial dispute between respondent Dollar Rent A Car Systems, Inc. (Dollar), a nationwide car rental company, and petitioners Cassan Enterprises, Inc., and CMC Investments, Inc. (Cassan), franchisees of Dollar. In 1993 Cassan filed an action in Washington State court alleging a variety of tort and breach of contract claims, as well as claims arising under two Washington state statutes, the Washington Consumer Protection Act and the Washington Franchise Investor Protection Act (FIPA). Cassan sought both damages and equitable relief. The case was removed to federal court.

Cassan's claims fell into two categories. First, it contended that Dollar wrongfully failed to offer financial assistance to Cassan in connection with Cassan's bid for a

concession at Sea-Tac Airport in Washington. Cassan demanded financial assistance of up to one-half of the monthly franchise fee that its Seattle operation was obligated to pay Dollar under the Franchise Agreement. Second, Cassan claimed that Dollar wrongfully refused to allow Cassan to accept an advertising allowance from GM, which was conditioned upon Cassan's advertising GM vehicles. Dollar had a policy that if vehicles were featured in advertisements, they had to be Chrysler vehicles. At the time Dollar was owned by Chrysler Corporation, which was also its featured fleet provider. Dollar refused to make an exception to this policy for Cassan.

Of relevance to the petition filed by Cassan, FIPA, generally prohibits franchisors from "discriminat[ing] between franchises in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing," unless the discrimination is 1) "reasonable," or 2) "based on franchises granted at materially different times" and the discrimination is "reasonably related" to that difference in time, or 3) is "not arbitrary." Wash. Rev. Code 19.100.180(1)(c) (1996). Cassan claimed that Dollar had discriminated against Cassan because Dollar had provided financial assistance to some franchisees seeking airport concessions and had allowed some franchisees to accept GM advertising allowances, while denying similar benefits to Cassan. Dollar denied these allegations.

The district court granted Dollar's summary judgment motion on the FIPA claim on the ground that application of the Act, which became law in 1972, to the Dollar-Cassan contract, which was entered into five years earlier, would violate the Contract Clause of the Washington State Constitution and of the United States Constitution, art. I, §10.

The other claims went to trial, and a jury found in favor of Cassan in the amount of $8.7 million. The court entered two injunctions against Dollar.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed in every respect. It granted judgment to Dollar as a matter of law on all legal claims, vacated the one injunction, and remanded the other injunction for further determinations.[1] In addition, it affirmed the grant of summary judgment in favor of Dollar with respect to the Contract Clause, holding that retroactive application of FIPA would indeed violate that provision.

In this Court, Cassan seeks review only of the Ninth Circuit holding that application of FIPA in this case would violate the Contract Clause.

## II. REASONS FOR DENYING THE WRIT

This case involves no conflict among the courts of appeals or with precedent of this Court. It breaks no new legal or constitutional ground. And it bears no national significance. The issue was decided correctly by both the district court and the court of appeals in accordance, as Petitioners concede, Pet. at 7-8, with virtually all courts that have looked at this or similar legislation.

Although not every state law affecting contracts violates the Contract Clause, that provision "is not a dead letter," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), and protects the legitimate, reasonable expectations of parties to a contract. The "threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.' " *Energy Reserves*

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[1] That injunction is still pending in the district court.

*Group, Inc., v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983), *quoting Spannaus* 438 U.S. at 244.

If the impairment is substantial, the second inquiry is whether the state has a "significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 412-13 (citation omitted); *see Spannaus*, 438 U.S. at 249 (legislation at issue "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's. . .").

In this case, the courts below properly found both that the impairment wrought by FIPA was severe and that the legislation did not address a broad and general social or economic problem. They are right on both counts. FIPA is special interest legislation which, if applied retroactively, would alter fundamental contract rights, such as Dollar's right to collect its franchise fee and its right to control its trademarks.

Although Petitioners tellingly do not address the seriousness of the contractual impairment that FIPA would cause in this case, it can hardly be gainsaid. First, if Dollar were required by FIPA to provide Cassan financial assistance in connection with Cassan's bid for a concession at Sea-Tac Airport, this obligation would materially change the franchise fees payable by Cassan to Dollar set forth in the franchise agreement. Similarly, if Dollar were required by FIPA to allow Cassan to accept an advertising allowance from GM conditioned upon featuring GM vehicles in Cassan's advertisements, this obligation would materially alter the contractual provision that allows Dollar to approve use of its logo in all advertising.

These changes would not constitute mere tinkering at the margins of the Dollar-Cassan agreement; they address, rather, core contractual issues. These "severe" and "permanent" changes, as the district court observed, would have "substantially impair[ed] Dollar's contractual rights because [they] would alter the reasonable expectations of the parties." A-14-15. These rights and expectations, moreover, were the result of "bargaining by the parties; and throughout the years since the contract was signed, the parties appear to have relied upon [their] terms." A-15. The courts below were thus clearly right that FIPA would operate as a substantial impairment of the contractual relationship between Dollar and Cassan.

With respect to the second part of the *Spannaus-Energy Reserves Group* test, the courts below were also correct in ruling that FIPA addressed only a "narrow class, not a general or broad societal problem. . .." A-14 (district court) and that retroactive application of FIPA was "insufficiently justified," A-10 (court of appeals). On its face, this statute clearly benefits only a special interest group, franchisees, and does not have as its purpose "the remedying of a broad and general social or economic problem." *Energy Reserves Group*, 459 U.S. at 411-12 (citation omitted). Thus, FIPA is akin to the pension funding charge that applied only to Minnesota employers that was struck down in *Spannaus* and is far different from the Kansas act that imposed price controls on natural gas that was upheld in *Energy Reserves Group*.[2]

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[2] The *Energy Reserves Group* Court found it significant that the natural gas industry is "heavily regulated," 459 U.S. at 413, presumably because parties to a contract in a heavily regulated industry must reasonably expect that contractual terms may be altered by laws or regulations. By contrast, Washington

FIPA did not impose "a generally applicable rule of conduct designed to advance 'a broad societal interest'. . ." but instead "directly 'adjusted the rights and responsibilities of contracting parties.' " *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983) (citation omitted). The "overall purpose of the Act is specifically to adjust the balance of power between contracting parties." *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 608 (S.D. Iowa 1993), *aff'd sub nom., Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 353 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994).

In sum, the courts below properly held that retroactive application of FIPA would violate the Contract Clause. The proof of this particular proposition lies in the fact, as acknowledged by Petitioners, that virtually every court (and every court of appeals) that has examined special interest statutes like FIPA has found them to be severe and unconstitutional impairments of contracts.[3] Indeed, the very

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State "had not previously regulated franchises in this manner. . .." A.14-15.

[3]*See, e.g., Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir.), *cert. denied*, 513 U.S. 1032 (1994); *Northshore Cycles, Inc. v. Yamaha Motor Corp.*, 919 F.2d 1041, 1043 (5th Cir. 1990); *Morgan v. Kemper Ins. Co.*, 754 F.2d 145, 147-48 (4th Cir. 1985); *Garris v. Hanover Ins. Co.*, 630 F.2d 1001, 1005-07 (4th Cir. 1980); *Fornaris v. Ridge Tool Co.*, 423 F.2d 563 (1st Cir.), *rev'd on other grounds*, 400 U.S. 41 (1970)(resolution of constitutional question should have been deferred to see if Puerto Rico court might construe statute in a way avoiding that question); *Mankaro Implement Inc. v. J.I. Case Co.*, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9947 (D. Minn. 1991); *Larco Distrib. Inc. v. Latrobe Brewing Co.*, 1990 WL 168702 (D. Kan. 1990), *Rochester v. Royal Appl. Mfg. Co.*, 569 F. Supp. 736 (W.D. Wis. 1983); *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F.Supp. 773, 779 (D.S.C. 1973);

provision at issue in this case was found to violate the federal Contract Clause if applied retroactively in *Chico's Pizza Franchises, Inc. v. Sisemore* 544 F. Supp. 248, 250 (E.D. Wash. 1981), *aff'd*, 685 F.2d 440 (9th Cir. 1982). ("[T]he conclusion is inescapable that FIPA profoundly altered, to the point of potential obliteration, the reasonable expectations of the parties").

Petitioner is simply unhappy with the state of the law, as it has been almost uniformly developed by federal and state courts, because it would like to see circumstances that better favor franchisees. That does not make out a basis for this Court's review. Petitioner fails to show any inconsistency between the case below and recent Contract Clause decisions in the federal courts of appeals. Nor can it distinguish such cases. In short, this private dispute between franchisor and franchisee over a reduction in the franchise fee and advertising restrictions implicates no "general or broad societal problem" that justifies retroactive application of FIPA. To the contrary, retroactivity would seriously interfere

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*Shell v. Metropolitan Life Ins. Co.*, 380 S.E.2d 183, 188-91 (W.Va. 1989); *Heublein, Inc. v. Department of Alcoholic Bev. Control*, 376 S.E. 2d 77, 79 (Va. 1989); *Birkenwald Distrib. Co. v. Heublein, Inc.*, 776 P.2d 721, 724-25 (Wash.Ct.App. 1989); *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872-74 (Minn. 1986), *cert. denied*, 479 U.S. 1060 (1987), *Fireside Chrysler-Plymouth Mazda, Inc. v. Chrysler Corp.*, 472 N.E.2d 861, 866 (Ill. App. Ct. 1984); *G-H Ins. Agency, Inc. v. Continental Ins. Co.*, 294 S.E.2d 336 (S.C. 1982); *Martino v. McDonald's Corp.*, 304 N.W.2d 780 (Wis. 1981); *Wipperfurth v. U-Haul Co.*, 304 N.W.2d 767, 773 (Wis. 1981); *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So.2d 681 (Fla. 1980); *Smith Ins., Inc. Co. v. Grievance Comm.*, 424 A.2d 816, 820 (N.H. 1980); *Ward v. Chevron U.S.A., Inc.*, 598 P.2d 1027 (Ariz. 1979); *Globe Liquor Co. v. Four Horses Distillers Co.*, 281 A.2d 19 (Del.), *cert. denied*, 404 U.S. 873 (1971)

with private commercial obligations in a fashion that the Contract Clause was intended to prevent.

## III. CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 15, 1998

(3)

Supreme Court, U.S.
FILED
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CLERK

No. 97 1669

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*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF FRANCHISEES AND DEALERS IN SUPPORT OF PETITIONERS

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## I. INTEREST OF AMICUS CURIAE[1]

*Amicus curiae,* the American Association of Franchisees and Dealers ("AAFD"), pursues the goal of promoting fairness and integrity in franchising throughout the United States. In pursuit of that goal, the *Amicus* promotes the equal application and protection of the law for franchisees and other small business owners who have been injured in business by unscrupulous and unlawful acts of others.

The AAFD has 5,000 members who are franchisees and dealers located in virtually every state. Membership in the AAFD is open to the millions of people who own, or who have an interest in owning, a franchised business, as well as the thousands of companies who seek to do business with franchisees. The AAFD came into existence for the express purpose of providing a counterbalance in the franchising industry, with its mission of bringing fairness to franchising. Among others, the American Bar Association has recognized the AAFD as "a growing force" in the franchising marketplace. *See, AAFD's "Fair Franchising Standards,"* Franchise L.J. 59 (Fall 1996). The AAFD seeks to educate the public regarding fair franchise practices and quality franchise opportunities, and to bring to the consumers' attention the unethical practices that have too long existed in the fran-

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[1] **Rule 37.6 Disclosure**

(a) No counsel for any party authored this brief in whole or part.

(b) Petitioner Cassan Enterprises, Inc. ("Cassan") is a franchisee-member of the Dollar Rent-A-Car chapter of the *Amicus*, the AAFD. As the owner of multiple units, it pays regular dues on an annual basis in the amount of $360. In addition, the Dollar Rent-A-Car chapter of the AAFD has contributed $7,000 to the AAFD to support the AAFD's *Amicus* attorney committee and to pay the costs of printing etc. of this brief. Cassan provided a substantial portion of that contribution.

chising community. By creating a level playing field in which franchisors and franchisees can achieve fair and equitable franchise agreements and relationships, the AAFD expects to help the franchising community achieve its enormous promise.

In this regard, the AAFD is dedicated to marketplace solutions to imbalances that exist within the franchising community. In 1996, the AAFD introduced its "Fair Franchising Standards," a set of comprehensive guidelines for balanced franchise relationships. These standards are a negotiated "work in progress" of the AAFD's Fair Franchising Standards Committee. This committee, made up of franchisors, franchisees, and franchise legal counsel, has been charged with the task of developing standards of franchising practices which balance the legitimate interests of franchisors and franchisees to achieve total quality franchising. The AAFD now offers its Fair Franchising Seal to franchise systems that embrace the AAFD's Standards. Robert L. Purvin, the chairman and founder of the AAFD, is quoted frequently in the press and is a nationally renowned expert in franchising.

The AAFD has members in more than 250 franchise systems, and its membership includes more than 60 active or forming franchisee associations, including, among others, All Tune & Lube, Baskin & Robbins, Carvel, Century 21, Chem Dry, Church's Chicken, Color Tile, General Nutrition, Heavenly Ham, Huntington Learning Centers, Jiffy Lube, Medicine Shoppes, Meineke Mufflers, Priority Management, Radio Shack, Tupperware, Servicemaster, State Farm Insurance, Straw Hat Pizza, Taco John's, and Wedding Pages Magazine Association.

## II. INTRODUCTION

This case involves a clearly erroneous interpretation of the "Contract Clause" (U.S. Const., Art. 1, §10) which was used to strike down a state law, the Washington State Franchise Investment Protection Act ("FIPA"). (RCW 19.100.180 *et seq.*) That statute was enacted to regulate the franchising industry in that state, and it "represents a fundamental public policy" of that State. (RCW 19.100.220) It is entitled to greater deference than that afforded by the Ninth Circuit in this case.

The questions presented are:

> Whether a State may regulate a franchisor's performance under a franchise agreement by requiring the franchisor to act in a way that is reasonable and not arbitrary towards the franchisees; or whether, in the absence of the statutory regulation, the franchisor had a contractual right to be unreasonable and arbitrary, and the state statute unconstitutionally "impaired" that contractual right to be unreasonable and arbitrary.

The answer must be that franchisors do not have a right, under any circumstances, to act unreasonably or arbitrarily in their dealings with their franchisees—and that state statutes which codify the franchisor's duty to be reasonable etc. are valid exercises of state police powers that do not violate the Contract Clause.

The Court should grant certiorari, and the decision of the Ninth Circuit should be reversed, for it improperly allows franchisors to hide behind the Contract Clause to avoid compliance with state laws which, in exercise of well-established police powers, seek to regulate well-documented abuses in the franchising industry. This case is all too typical of the misinterpretation of the Contract Clause in the lower courts. Clarification by the Supreme Court on Contract Clause jurisprudence is urgently needed by the fran-

chising industry, and by all other industries that are subject to state police power regulation.

## III. STATEMENT OF FACTS: The Landscape of Franchising

Today, franchising—which has its roots in feudalism and in licenses granted by English kings[2]—is one of the dominant means for distributing goods and services in the United States. Franchises employ over eight million (8,000,000) people and account for more than $800 billion in annual sales, or more than 40% of all retail sales throughout the country. *See,* C. Mason-Draffen, *Heaven and Hell: For Some, Franchising is a Dream Come True, For Others It's Their Worst Nightmare,* Newsday, Aug. 28, 1994, at A88. It has been estimated that by the year 2000, franchises may be responsible for over 50% of all retail sales in the United States. *See*, House Comm. on Small Business, 101st Cong., 2d Sess., Report on Franchising in the U.S. Economy: Prospects and Problems (Comm. Print 1990).

While franchisors often present franchising as an opportunity for individuals to become "entrepreneurs," that opportunity generally comes at a high cost and carries with it significant risks. By any measure, the initial cost of becoming a franchisee is substantial. *See, e.g.,* R. Martin, *Studies Confirm, Contradict Conventional Wisdom,* Nation's Restaurant News, Oct. 14, 1996, at 225 (in typical franchise systems, average "initial start-up cost" was $140,000); G. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts,* 42 STAN. L. REV. 927, 934 (1990) (initial investment "ranges from a few thousand dollars to set up a tax service to over half a million dollars for a fast-

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[2] R. Emerson, *Franchising and the Collective Rights of Franchisees,* 43 VAND. L. REV. 1503, 1507 (1990).

food outlet"). *See generally,* R. Purvin, *The Franchise Fraud: How to Protect Yourself Before and After You Invest* (1994).

Part of that cost is generally an initial license fee that the franchisee must pay to the franchisor for the right to use the franchisor's trademarks and tradenames. That fee is frequently non-refundable, even in the event that the prospective franchisee never opens a shop. Upon becoming a franchisee, an individual generally relinquishes control over many aspects of the business to the franchisor. For instance, franchisors often control the use of the trademarks; enact standards for quality control of the relevant goods and services; mandate specific training; set minimum personnel levels; require audits and financial disclosures from franchisees; direct product and supply purchases; and control the content and placement of all system advertising. Typically, the franchise relationship extends for a finite number of years during which the franchisee must pay continuing royalties to the franchisor on some periodic basis.

Further, while many franchisors tout out-dated studies suggesting high success rates for franchisees, the truth is just the opposite. Two recently published university studies commissioned by the Small Business Administration indicate that the failure rate for franchisees is actually *higher* than the failure rate for independent small businesses. *See, Franchising: Golden Opportunity or Risky Business?*, Small Business Advocate 8 (May/June 1996); R. Martin, *supra*, at 225. Within the first five years of operation, *approximately 38% of new franchisees fail and go out of business,* versus a comparable failure rate for non-franchised independent small businesses of only 32%. *Id.* Equally as significant, franchisees in the first five years of operation average annual net *losses* of $4,500, while non-franchised independent small businesses average annual *profits* of $15,500. *Id.*

As one researcher has noted, "[m]ost people think of franchising as some kind of bonanza. . . . The reality today

is if you get a solid operation, work damn hard, and you're making $40,000 a year after four years, that's good." A. Serwer, *Trouble in Franchise Nation,* Fortune, March 6, 1995, at 116 (comments of Ann Dugan, the Director of the University of Pittsburgh's Small Business Development Center). *See also,* W. Grimes, *Perspective on Franchising: When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism,* 65 ANTITRUST L.J. 105, 130-31 (Fall 1996) (discussing "the rainbow myth [of high profitability] fostered by franchisor salesmanship"); R. Purvin, *supra.* Moreover, not all franchise systems present the same opportunity to franchisees. Obviously, some franchise systems are more profitable than others. The most-successful 10% of all franchise systems account for almost 75% of all the franchise sales in the United States, while the other 90% of franchise systems share the rest. W. Grimes, *supra,* at 131 (*citing* A. Serwer, *supra,* at 116). One study has found that of the 138 franchise systems launched in 1983, only 25% were even still operating 10 years later in 1993. R. Martin, *supra,* at 225.

According to one 1996 survey, a majority of franchisees are satisfied with franchising and would recommend it to others. E. Shubart, *73% Franchisees "Satisfied": Poll,* Franchise Times (June 1, 1996). However, according to those franchisees who were *not* satisfied, the single largest problem with franchising is "lack of support from franchisors." *Id.* Lack of franchisor support is particularly harmful to a franchisee because of his/her necessary reliance on the franchisor. Although sometimes denied by franchisors, it is a well-accepted fact that franchisors are the dominant party and franchisees are the subservient party in the franchise relationship. Outside of court, "some franchisor leverage over franchisees is widely conceded" even within the franchisor community. W. Grimes, *supra,* at 126. As Circuit Judge Edward Becker recently noted, many "franchisors are leviathans" and franchise "arrangements are clearly onerous to

the average franchisee, a relatively small business person whose sunk costs in the franchise represent all or most of his or her assets and who lacks considerable resources necessary to switch or defranchise." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 129 F.3d 724, 726 (3d Cir. 1997) (Becker, J., dissenting from denial of rehearing petition). *See also, Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 627 (N.J. 1996) ("our common experience" suggests franchisors are in superior economic position compared to franchisees); H.R. 1717, 104th Cong., 1st Sess. (1995) (finding "[m]any franchises reflect a profound imbalance of contractual power in favor of the franchisor"); Va. Code Am. § 13.1-553 (Virginia Retail Franchising Act intended "to correct as rapidly as practicable such inequities as may exist . . . so as to establish a more even balance of power between franchisors and franchisees").

Always in theory and often in practice, franchising can bring profit to franchisors and franchisees alike, and efficiently bring desired goods and services to the consuming public. The benefits of franchising, however, are only realized when franchisors and their franchisees work together, fairly and in good faith, to promote their common interests.

## IV. GROUNDS FOR CERTIORARI

### A. The Ninth Circuit Decision Reflects Conflict in the Caselaw

Certiorari is necessary to correct an error of constitutional law by the Court of Appeals that, in the first instance, reflects widespread confusion in the federal and state courts concerning the proper application of the "Contract Clause" to regulatory legislation enacted by the states under their inherent police powers. Petitioner Cassan Enterprises, Inc. ("Cassan") has recited this Court's Contract Clause jurisprudence, as well as the confusion in the lower courts on this

issue, at pages 10-14 and 15-24. In addition to the cases cited by Petitioner, the courts in the following cases have upheld retroactive application of franchise regulation statutes, finding that there was no impairment of existing franchise agreements in violation of the Contract Clause. As summarized by Commerce Clearinghouse (CCH) *Business Franchise Guide*:

- *Schieffelin & Co. v. Dept. of Liquor Control, et al.*, CCH BUSINESS FRANCHISE GUIDE ¶8247 (Connecticut 1984) ("Application of an amendment to the Connecticut Liquor Control Act to preexisting distributorships was not an unconstitutional impairment of contract [even] [a]ssuming that the amendment severely impaired the manufacturer's right to terminate distributorships of six months' duration . . . In light of the state's pervasive regulatory power and the manufacturer's reasonable expectations, reduction of the duration requirement could not be regarded as a substantial impairment of contractual relationships. Even if there were a substantial impairment, such impairment would have been justified by the significant and legitimate purpose of the state regulation: to protect distributors from termination without cause and to prevent out-of-state shippers from dominating Connecticut wholesalers. . . .").
- *Nissan Division etc. v. Fred Anderson et al.*, CCH BUSINESS FRANCHISE GUIDE ¶10,292 (N.C. App. 1993) ("Application of an amendment to the North Carolina motor vehicle dealer law, restricting a manufacturer's right to disapprove the relocation of a franchise, did not impermissibly impair the constitutional right to contract of parties to a preexisting dealership agreement. Although the U.S. Constitution forbids states from impairing the obligation of contracts, the right to make a contract remains subject to the state legislature's power to impose restrictions for the benefit of the general public in areas of public interest. In its statement of purpose of the motor vehicle dealer law, the general assembly declared that the distribu-

tion of motor vehicles affected the public interest and welfare of the state and that, in exercising its police power, the state could regulate persons involved in the manufacture and distribution of motor vehicles. The amendment, which provides a procedure by which a dealer may seek administrative review of a manufacturer's refusal to allow a relocation, was a patently reasonable exercise of the state's police power. The procedure would not totally discourage persons from entering into motor vehicle franchise agreements. The amendment could not be said to disturb the core expectations of the contract between the parties.")

The decision of the Ninth Circuit cannot be reconciled with these cases, or with *N.A. Burkitt, Inc. v. J.I. Case Co.*, 597 F.Supp. 1086 (D. Me. 1984) ("Application of an amendment to the Maine motor vehicle dealer law to a preexisting dealership was not an unconstitutional impairment of contract because the amendment . . . did not cause a substantial impairment of vehicle manufacturers' contractual rights. . . . Even if [there was] a substantial impairment of a manufacturer's contractual interests, such impairment would be justified as a valid exercise of Maine's police power. By enacting the challenged amendment, the State of Maine exercised a significant and legitimate interest in regulating business practices to eliminate 'unfair methods of competition and unfair deceptive practices' within the state. Such regulation can foster a more stable business climate for all businesses—thus aiding the state economy—and benefit consumers through prevention of arbitrary and hasty termination of local dealerships.")

The Ninth Circuit did not consider any of these conflicting decisions or engage in any meaningful analysis of the Contract Clause issue. The court perfunctorily affirmed the district court, which had relied principally on an earlier district court case, *Chico's Pizza Franchises, Inc. v. Sisemore*, 544 F.Supp. 248 (E.D. Wash. 1981), *aff'd* 685 F.2d 440 (9th Cir. 1982). The holding in the instant case, like the holding in

*Chico*, cannot be reconciled with the contrary decisions cited herein, and by Petitioner, warranting Certiorari in this case.

### B. FIPA Does Not "Impair" Any Contract "Obligations"

The Ninth Circuit's decision improperly derogates a statute of the State of Washington which that State has held to reflect its fundamental public policy. It thereby derogates the State of Washington's valid exercise of its "police powers" in regulating a key industry, franchising, which affects a large number of persons, constitutes an increasingly important sector of the economy, and is in dire need of appropriate regulatory legislation, as the Washington legislature had determined. Petitioner Cassan argues that FIPA is not unconstitutional because it is a valid exercise by Washington State of its police powers, and that Certiorari should be granted given the confusion that has developed in the lower courts on this issue. The *Amicus* endorses that position, as discussed in Sections (A) and (C) of this argument. Equally important, however, is that this case presents an opportunity to clarify the threshold standard for determing whether there has been an "impairment" of contract:

1. FIPA does not impair any obligation of Cassan, or of Dollar, under the parties' franchise agreements. It merely regulates Dollar's performance of its contractual rights and duties.

2. FIPA does not *substantially* impair any of Dollar's rights. Even before the FIPA was enacted, Dollar had no reasonable expectation of being able to act unreasonably or arbitrarily in its dealings with its franchisees. It was instead subject to a common law implied covenant of good faith and fair dealing, under which it had no right to act arbitrarily, capriciously or unreasonably.

### 1. To regulate performance does not impair any contract obligations

The Contract Clause, U.S. Const., Art. 1, §10, provides in pertinent part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

As a threshold issue, this case presents an opportunity for the Court to correct a serious misapplication of the Contract Clause to state legislation that does not improperly *impair a contract obligation*, but instead merely *regulates contract performance*. This fundamental distinction is plain from the language of Article 1, §10, and is rooted in the Contract Clause's history. As the Court has recognized, the Contract Clause "was made part of the Constitution to remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts—and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.'" *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231, 240, 78 L.Ed. 413 (1934). Its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy. *Id.*

Here, the State of Washington has validly exercised its police powers to enact a law, FIPA, that regulates the performance of franchisors under their franchise agreements with franchisees, but which does not impair the obligations of the franchisees to the franchisor. The challenged FIPA provisions do not relieve Petitioner Cassan from any of its obligations to Respondent Dollar under the parties' franchise agreement or any other contract between them. Cassan alleges that Dollar violated FIPA, by (1) barring Cassan from leasing GM cars, although other franchisees

were allowed to lease GM cars; and (2) denying assistance to Cassan to maintain a full-service airport rental business, while providing such assistance to other franchisees in similar situations. Cassan alleges that the franchisor's discriminatory conduct in the performance of the franchise agreement violates the provisions of FIPA that prohibit franchisors from "[d]iscriminat[ing] between franchisees . . . in any [ ] business dealing . . . unless and to the extent that that the franchisor satisfies the burden of proving that any classification or discrimination between franchisees is: (i) *Reasonable*; . . . and (iii) and is *not arbitrary* . . . ." RCW 19.100.180.

Cassan is not seeking relief from any of the *obligations* to Dollar that it undertook in its franchise agreement. No obligation of Cassan is *impaired* by requiring Dollar to conform its behavior to FIPA's anti-discrimination provisions. The Court of Appeals' decision to strike down the FIPA simply does not fit within either the plain language or the recognized historical purpose of the Contract Clause.

### 2. In view of its common law duty of good faith, dollar did not have a "reasonable expectation" of being able to act arbitrarily and unreasonably in discriminating among its franchisees

Secondly, a grant of Certiorari in this case would allow the Court to confirm that the Contract Clause is not violated unless there is a *substantial* impairment of a contract right, and that there is no substantial impairment unless the party claiming impairment had a "reasonable expectation" of receiving the particular contract benefit that would be impaired by retroactive application of the state statute. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). In *Energy Reserves*, the Court approved a retroactive application of a price control law

enacted by Kansas to invalidate a contract between a natural gas producer and a public utility. There was no question that a price control statute was an impairment of a contract obligation to pay a higher price. However, the state law was not unconstitutional, in the first instance, because the producer did not have a "reasonable expectation" of actually receiving significantly higher prices than were permitted under the price control law. *Id.* The Court stated:

> The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.*, 438 U.S., at 244, 98 S.Ct., at 2722. *See, United States Trust Co.*, 431 U.S., at 17, 97 S.Ct., at 1515. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel Co.*, 438 U.S., at 245, 98 S.Ct., at 2723. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. *United States Trust Co.*, 431 U.S., at 26-27, 97 S.Ct., at 1519-1520. *On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. Id.*, at 31, 97 S.Ct., at 1522, citing *El Paso v. Simmons*, 379 U.S. 497, 515, 85 S.Ct. 577, 587, 13 L.Ed.2d 446 (1965).

459 U.S. at 411, 103 S.Ct. at 704 (citations original) (emphasis added).

Here, Dollar and Cassan entered into their franchise agreement in 1967, prior to the enactment of FIPA.[3] However, under *Energy Reserves*, Dollar cannot establish an "impairment" unless it could show that before FIPA, it had a "reasonable expectation" of being able to discriminate *arbitrarily* and/or *unreasonably* against Cassan. That proposition is specious.

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[3] Petitioner's Brief, p. 2.

Specifically, since at least 1966, one year before the Dollar/Cassan franchise agreement, the Supreme Court of the State of Washington has recognized the common law doctrine that there is an *implied covenant of good faith and fair dealing* which is implied as a matter of law in every contract.[4] *See, Miller v. Othello Packers, Inc.,* 410 P.2d 33, 34 (Wash. 1966) ("There is an implied covenant of good faith and fair dealing in every contract, a covenant or implied obligation to cooperate with the other so that each may obtain the full benefit of performance."); *Long v. T-H Trucking Co.*, 486 P.2d 300, 302 (Wash. App. 1971); *Matter of Estate of Hollingsworth*, 560 P.2d 348, 352 (Wash. 1977); *Lonsdale v. Chesterfield,* 662 P.23d 385, 387-388 (Wash. App. 1983) (same).

In the field of franchising, the implied covenant of good faith and fair dealing has been described as a "clever chameleon." Lee Abrams and John A. Donovan, "Clever Chameleon: Good Faith and Fair Dealing," ABA Forum on Franchising, 1995 Annual Forum, Vol. 1, Tab 7. It has been applied by courts in myriad factual settings where franchisors have discretion in performing their contractual obligations or exercising their contractual rights, *e.g.*, the testing of a franchisee's compliance with the franchisor's operational standards; the renewal, transfer or termination of franchise agreements; and the issue of whether a franchised location has been "encroached" by competing franchises, company-owned stores or alternative channels of product distribution.

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[4] The *Amicus* makes no assumption as to whether the particular franchise agreement in this case was subject to Washington law, or whether it contained a choice of law clause requiring the application of another state's law. The implied covenant of good faith and fair dealing is recognized in most states, negating the importance of this point for purposes of the decision whether to grant Certiorari.

In the absence of a statute such as FIPA, the common law implied covenant of good faith and fair dealing would apply to claims that a franchisor has discriminated among its franchisees with respect to its allocation of the benefits of being a franchisee; a franchisor, in exercising discretion as to whether to extend a particular benefit to some franchisees but not others, may be in breach of the implied covenant of good faith which it owes as a matter of law to all the franchisees. *See, e.g. BJM & Associates, Inc. v. Norrell Services, Inc.*, CCH BUSINESS FRANCHISE GUIDE ¶10,485 (E.D. Ky. 1994) (an employment agency franchisee's claim that the franchisor had discriminated against it by excluding it from a bonus commission program offered to numerous other franchisees was tested under the implied covenant of good faith); *see also, Dean v. Kerr-McGee Refining Corp.*, CCH BUSINESS FRANCHISE GUIDE ¶9181 (D. Okla. 1988) (holding that a franchisee's claim that it had been subjected to discriminatory rent increases by the franchisor had been preempted by the Petroleum Marketing Practices Act, 15 U.S.C. §2801 *et seq.*; "but for" that act, the implied duty of good faith would have applied.) Further, the implied covenant of good faith has supplied the standard under at least one federal franchisee protection statute, the Automobile Dealers Day In Court Act, 15 U.S.C. §§ 1221 *et seq.*, for adjudicating claims that automobile dealers have discriminated among various franchised dealers in allocating cars to those dealers. *See, Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, CCH BUSINESS FRANCHISE GUIDE ¶8712 (10th Cir. 1986). In sum, the implied covenant of good faith is irrevocably intertwined with myriad federal and state statutes aimed at the subject of franchisor misconduct, and which seek to regulate the performance of franchisors and franchisees in their contractual arrangements.

Even in *Chico's Pizza*, the earlier district court case that provides the precedent for the instant decision, the district judge recognized that "[i]f defendants had discovered that

Chico's accorded other franchisees perhaps more favorable treatment prior to the passage of FIPA, that realization would have been fruitless *except to the extent such dealings may have been shown to run contrary to a common law requirement of good faith*." 544 F.Supp. at 249-50 (emphasis added). However, despite that insight, the district court in *Chico's Pizza*, and the Ninth Circuit, erroneously ignored the role of the implied covenant of good faith and fair dealing in assessing the franchisor's "reasonable expectations" prior to FIPA.

In sum, long before FIPA, Dollar was subject to a common law duty to act in good faith, which included a duty to be commercially reasonable, in acting under its franchise agreements. The enactment of the statute may have provided the franchisees with additional remedies, but it did not deprive Dollar of any purported "right" at common law to unreasonably or arbitrarily discriminate against Cassan in granting permission to sell GM cars or to support Cassan's effort to maintain a full-service rental business at the airport. Since Dollar had no reasonable expectation of being able to discriminate in an unreasonable or arbitrary manner, it suffered no substantial impairment of any contract right by reason of FIPA. Therefore, FIPA does not violate the Contract Clause. *Energy Reserve, supra.*

### C. FIPA is a Valid Exercise of Washington State's Police Powers

For the reasons above, this case provides a much-needed opportunity for the Court to confirm that, where there is not a substantial impairment of a contract right that deprives a party of its reasonable expectations, there is not a violation of the Contract Clause. Moreover, this case presents a further opportunity to confirm that even if there is a substantial impairment, the lower courts must perform a balancing

analysis of several competing interests before concluding that the Contract Clause was offended. As stated in *Home Building & Loan Assn. v. Blaisdell*, *supra*, the Contract Clause is not to be read literally—*i.e.*, not every substantial impairment of a contract right is unconstitutional. 90 U.S. at 445.

It is settled that if the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation (*United States Trust Co. v. State of New Jersey*, 431 U.S. 1, 22 (1977)); for example, the remedying of a broad and general social or economic problem. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 247, 249 (1978). The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. *Id.* As stated in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 504 (1987):

> [I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Manigault v. Springs*, 199 U.S. 473, 480 . . . (1905). As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 . . . (1908): "One whose rights, such as they are, are subject to state restriction, cannot remove

> them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241-242 . . . (1978).

The Washington legislature's decision to regulate the performance of franchisors is a reasonable exercise of the State's police powers, and is necessary to curb well-documented abuses in one of the fastest growing and most important sectors of our national economy, *i.e.*, the franchising industry. As other courts and many commentators have stated, the problems in franchising are a broad economic problem that deserve police power regulation. *N.A. Burkitt, Inc. v. J.I. Case Co., supra*, 597 F.Supp. 1086; *Schieffelin & Co. v. Dept. of Liquor Control, et al., supra*, CCH BUSINESS FRANCHISE GUIDE ¶8247; *Nissan Division etc. v. Fred Anderson et al., supra,* CCH BUSINESS FRANCHISE GUIDE ¶10,292.

In striking down FIPA, both the District Court and the Ninth Circuit failed to engage in the required balancing analysis to weigh the alleged impairment against the legitimate state interests that deserve protection. The Ninth Circuit cited *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992), and *Northwestern Nat'l. Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980), cases which acknowledge that a balancing of interests is required, but the Court of Appeals defaulted on its duty to perform that analysis. The Ninth Circuit stated in a single conclusory sentence that FIPA's substantial impairment was not "substantially justified"—a sweeping statement that was erroneous in both its premise and conclusion, and which certainly deserved far greater attention than the Ninth Circuit provided.

From the "landscape of franchising" in the *Amicus'* Statement of Facts, the following conclusions are inescapable: (1) franchising is a growing form of distribution that may soon

affect 50% of all retail sales if recent trends continue; (2) despite many success stories in franchising, franchise relationships are highly susceptible to abusive, opportunistic behavior given the overwhelming economic disparity between the resources of a franchisor versus a typical franchisee; (3) many franchisees have suffered unfairly due to abusive practices by franchisors; (4) an increasing number of jurisdictions have enacted legislation to regulate franchisor conduct and thereby protect franchisees from recurring abuses, such as unreasonable discrimination as alleged here; and (5) the states that have enacted franchisee protection laws have recognized that those laws are a fundamental public policy, as the State of Washington has done here.

Franchisee protection laws such as FIPA are not special interest laws that relieve franchisees of their contractual burdens. Instead, these laws supplement the common law duty by providing countless franchisees with enhanced statutory remedies from arbitrary and unfair conduct that the common law does not permit. As the Washington legislature determined, it is critical that these laws be applied to pre-existing franchise agreements because the typical franchise agreement may last 10, 20 or even 30 years, which is far too long to wait for statutory protection. Moreover, it makes no sense to subject the franchisor to potentially varying legal standards of conduct towards different franchisees depending on when they joined the system. This case will also be of enormous importance if proposed federal franchisee protection legislation, which is currently pending in Congress as H.R. 2954 and H.R. 1083, were to be enacted.

## CONCLUSION

In sum, the Ninth Circuit erred in holding FIPA unconstitutional and in giving so little attention to this important issue. For all these reasons, the American Association of

Franchisees & Dealers respectfully urges the Court to grant Certiorari to the Petition of Cassan Enterprises, Inc.

Date: May 14, 1998

Respectfully submitted,

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[5] Mr. Caruso's application for admission to the Bar of the United States Supreme Court is submitted herewith.

Supreme Court, U.S.
FILED
MAY 27 1998
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# No. 97-1669

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

CASSAN ENTERPRISES, INC., ET AL.,
*Petitioners,*

v.

DOLLAR SYSTEMS, INC., ET AL.,
*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

## PETITIONERS' REPLY BRIEF

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APP

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United States Court of Appeals for the Ninth Circuit

## PETITIONERS' REPLY BRIEF

Respondents' Brief in Opposition does not take issue with the premise of the Petition for Writ of Certiorari, *i.e.*, that there is "widespread confusion in [Contract Clause cases] about the deference to be accorded state legislative judgments regarding the reasonableness and appropriateness of legislation that affects private contracts." Cert. Petition at 8. Nor can the Respondents dispute the necessity or importance of guidance from this Court on such a central and recurring issue of constitutional law.

Rather, Respondents denigrate the importance of the particular legislation involved in this case, dismissing franchise protection laws as "special interest legislation." Resp. Brief at 4. This

illustrates how phrases such as "special interest legislation" have become facile substitutes for analysis under the Contract Clause. Respondents do not explain how this legislation fails to serve a "significant and legitimate public purpose" by addressing problems acknowledged as important by Congress and this Court in an industry constituting almost half of the retail economy. Nor do Respondents identify the "special interest" that induced twenty-two states to provide protection in this area. *Compare Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1250-51 (3d Cir.) (statute was "special interest" legislation because directed at *one* employer), *cert. denied*, 484 U.S. 963 (1987).

Respondents' contention that there is no conflict in the federal courts of appeals is a tacit admission that conflicts are rife when the analysis is broadened to include decisions of the state courts and federal district courts. Even isolating the federal courts of appeals, it is apparent that Respondents' proposition is true only in the narrowest sense. Contract Clause cases at the federal appellate level seldom arise in the same factual context. However, even a casual review of the cases cited in the Petition demonstrates fundamentally different views between—and within—the Circuits, not only on the proper application of the Contract Clause, but also on the relative importance of and the consistency between *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983). There is genuine and unmistakable confusion about what those cases mean and what the Contract Clause requires.

Opinions such as the Ninth Circuit's below have cut the Contract Clause loose from its historical moorings and have given judges almost an unfettered license to substitute their judgment on the public good for that of the legislature. The specific legislation at issue in this case is a "fundamental policy" of the State of Washington which the state legislature explicitly

made applicable to pre-existing franchise agreements. There is nothing "garden variety" about a judicial determination that these legislative judgments are unconstitutional.

Under the FIPA, Dollar can continue to collect franchise fees and control its trademarks. The FIPA only requires that Dollar exercise those rights fairly and consistently: affording its franchisees the same uniformity that it demands of them. Any citizen has a legitimate expectation that he will not be deprived of a statutory right or protection by an arbitrary application of a constitutional proscription. Yet that occurred below and will continue to occur until this Court provides critical clarification of the scope and meaning of the Contract Clause.

Respectfully submitted,

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Date: May 26, 1998